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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. ~~51~~ 51

CENTRAL LUMBER COMPANY, PLAINTIFF IN ERROR

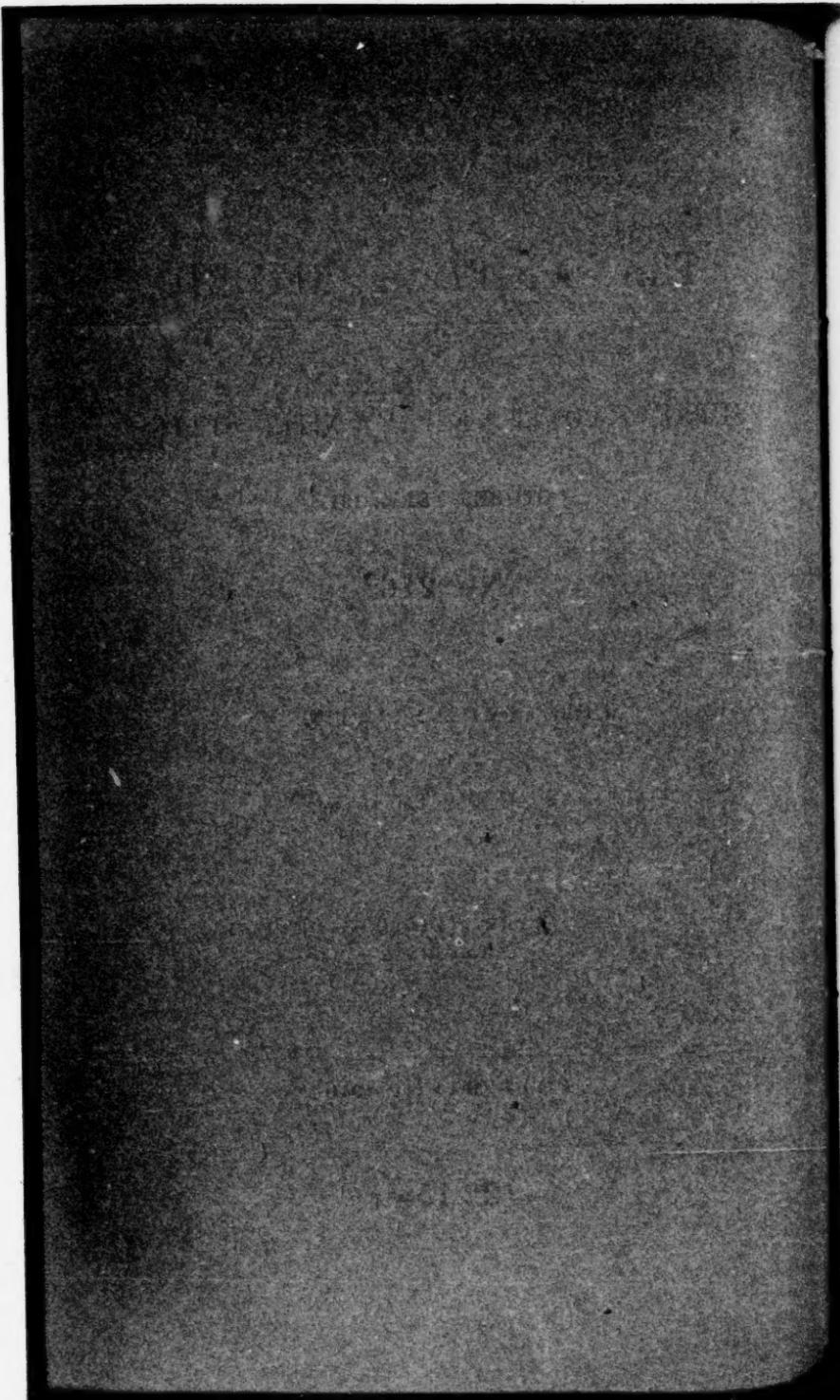
vs.

STATE OF SOUTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

FILED MAY 11, 1912.

(22,158.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 276.

CENTRAL LUMBER COMPANY, PLAINTIFF IN ERROR,

vs.

STATE OF SOUTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH
DAKOTA.

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a In Supreme Court, State of South Dakota, April Term, 1909.

2760.

STATE OF SOUTH DAKOTA, Plaintiff and Respondent,
vs.
CENTRAL LUMBER COMPANY, a Corporation, Defendant and
Appellant.

a *Appellant's Abstract.*

Appeal from McPherson County Circuit Court.

Sears & Potter, Brown, Abbott & Somsen, Seward & McFarland,
Attorneys for Appellant.

Supreme Court, State of South Dakota. Filed Feb. 16, 1909.
Frank Crane, Clerk.

1 In the Supreme Court of the State of South Dakota, April
Term, 1909.

STATE OF SOUTH DAKOTA, Plaintiff and Respondent,
vs.
CENTRAL LUMBER COMPANY, a Corporation, Defendant and
Appellant.

Appellant's Abstract of Record.

In the above entitled cause Theodore J. P. Geidt, state's attorney within and for McPherson county, South Dakota, in the Sixth Judicial circuit, did on the 16th day of December, 1908, file an information against the defendant, Central Lumber Company, duly verified, which, omitting the formal parts, is as follows:

Information for Unfair Discrimination.

2 Theo. J. P. Geidt, the state's attorney within and for Mc-
Pherson county, within the Sixth Judicial circuit of the state
of South Dakota, as informant, in the name and by the au-
thority of the State of South Dakota, upon his oath presents and
charges that the Central Lumber Company, a corporation, as herein-
after defined, on or about the 22d day of September, A. D. 1908,
within the county of McPherson and state of South Dakota, did com-
mit the crime of unfair discrimination, as follows: That heretofore
and on or about the 22d day of September, A. D. 1908, at the town
of Leola, and in the county of McPherson, in the state of South
Dakota, the Central Lumber Company, being then and there a for-
eign corporation duly organized and existing under and by virtue

of the laws of the state of Minnesota, and theretofore and on or about January 26, 1899, it having duly filed in the office of the secretary of state a duly authenticated copy of its articles of incorporation, and appointed a resident agent within the state, and caused to be duly recorded in the office of the secretary of state and in the office of the register of deeds of the county wherein said agent resides a duly authenticated copy of the appointment of said agent, and by virtue thereof it then became and ever since has been and is now duly and legally authorized to do business in this state, and so doing business in this state, and being engaged in the sale and distribution of a commodity in general use, to-wit: lumber and building material, in the town of Leola, McPherson county, South Dakota, and in the town of Ipswich, Edmunds county, South Dakota, and elsewhere, did willfully, wrongfully, unlawfully and intentionally, and for the purpose of destroying competition of a regular established dealer in such commodity, then engaged in like business in the town of Leola, McPherson county, South Dakota, to-wit: the Mitchell Lumber Company, a corporation duly organized and existing

under and by virtue of the laws of the state of South Dakota, discriminate between different sections and communities of the state of South Dakota, to-wit: the said town of Leola, McPherson county, South Dakota, and the town of Ipswich, Edmunds county, South Dakota, by selling such lumber and building material at a lower rate in the town of Leola, McPherson county, South Dakota, than was charged by the said Central Lumber Company for said lumber and building material in said town of Ipswich, Edmunds county, South Dakota, after equalizing the distance from the point of production, manufacture and distribution, and freight rates therefrom; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of South Dakota.

THEO. J. P. GEIDT,

State's Attorney of the County of McPherson, South Dakota.

And to the foregoing information, the defendant appeared by its attorneys, and filed in writing the following

Demurrer.

Now comes the defendant above named and demurs to the information filed in the above entitled action, on the grounds:

1. That the facts stated in said information do not constitute a public offense.

2. That the facts stated in said information do not constitute a public offense for the several reasons, to-wit:

(a) That the act of the legislature of the state of South Dakota under which this information is filed, relating to unfair competition and discrimination, and entitled

4. "An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto,"

approved March 5, 1907, is violative of the constitution of the state of South Dakota, and consequently null and void.

(b) That the act of the legislature of the state of South Dakota under and by virtue of which this information is filed, relating to unfair competition and discrimination, and entitled:

"An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto,"

approved March 5, 1907, is violative of the constitution of the state of South Dakota, and consequently null and void, for the several reasons, among others:

That such enactment, if given effect, would deprive the above named defendant, Central Lumber Company, of liberty without due process of law.

That such enactment, if given effect, would deprive the above named defendant, Central Lumber Company, of property without due process of law.

That such enactment, if given effect, would deny the above named defendant, Central Lumber Company, of equal protection of the laws.

That such pretended enactment is not equal or uniform in its provisions.

That such pretended enactment does not apply equally to all persons similarly situated.

That such pretended enactment is class legislation.

(c) That the act of the legislature of the state of South Dakota under which this information is filed, relating to unfair competition and discrimination, and entitled:

5 "An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto,"

approved March 5, 1907, is violative of the constitution of the United States, and is consequently null and void.

(d) That the act of the legislature of the state of South Dakota under which this information is filed, relating to unfair competition and discrimination, and entitled:

"An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto,"

approved March 5, 1907, is violative of the constitution of the United States, and is consequently null and void, for the several reasons, among others.

That such enactment, if given effect, would deprive the above named defendant, Central Lumber Company, of liberty without due process of law.

That such enactment, if given effect, would deprive the above named defendant, Central Lumber Company, of property without due process of law.

That such enactment, if given effect, would deny to the above named defendant, Central Lumber Company, equal protection of the laws.

That such enactment, if given effect, would abridge the privileges and immunities of the above named defendant, Central Lumber Company, as a citizen of the United States.

3. That the act of the legislature of the state of South Dakota, under which this information is filed, relating to unfair competition and discrimination, and entitled:

6 "An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto."

approved March 5, 1907, is in violation of the fourteenth amendment to the constitution of the United States, which is as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

for the several reasons that, if such enactment is given effect as against the above named defendant, Central Lumber Company, it will:

- (a) Deprive said defendant of liberty to contract.
- (b) Deprive said defendant of property without due process of law, and for the further several reasons:
- (a) That such statute is not equal or uniform in its provisions.
- (b) That such statute does not apply equally to all persons similarly situated.
- (c) That such statute is class legislation.
- (d) That such statute is not a valid exercise of the police power of the state of South Dakota.

Dated December 16, 1908.

SEARS & POTTER,

Attorneys for Defendant.
BROWN, ABBOTT & SOMSEN,

Attorneys for Defendant.

And the question of law came on for hearing upon said demurrer, on the 16th day of December, 1908, and the said demurrer was overruled in the following order, signed and filed in said cause by the court on the 16th day of December, 1908:

Now on this 16th day of December, 1908, the defendant above named having filed in open court its demurrer to the information filed in said cause by the state's attorney of McPherson county, South Dakota, and said demurrer coming on for hearing in open court, and the court being fully advised thereon:

It is ordered that the said demurrer be overruled.

By the Court,

LYMAN T. BOUCHER, *Judge.*

Attest:

ULRICH REUE, *Clerk.*

To which order the defendant then and there duly excepted. And the defendant thereafter entered a plea of not guilty to the said information.

And a jury was then impanelled to try the issue in said cause, upon the information theretofore filed, and the defendant's plea of not guilty.

The plaintiff then called William M. Mitchell, who was sworn as a witness on behalf of the state. The defendant then requested of plaintiff's attorneys that they specify the law under which the said information is filed, and thereupon plaintiff's attorneys stated that the said law under which said information is filed is Chapter 131 of the Session Laws of South Dakota for the year 1907, entitled

"An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto."

approved March 5, 1907.

The defendant then objected to the introduction of any evidence under the information in this action, on the grounds following:

1. That the facts stated in said information do not constitute a public offense.
8 2. That the facts stated in said information do not constitute a public offense for the several reasons, to-wit:

(a) That the act of the legislature of the state of South Dakota, under which this information is filed, relating to unfair competition and discrimination, and entitled

"An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto."

approved March 5, 1907, is violative of the constitution of the state of South Dakota, and consequently null and void.

(b) That the act of the legislature of the state of South Dakota under and by virtue of which this information is filed, relating to unfair competition and discrimination, and entitled

"An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto."

approved March 5, 1907, is violative of the constitution of the state of South Dakota, and consequently null and void, for the several reasons, among others:

That such amendment, if given effect would deprive the above named defendant, Central Lumber Company, of liberty without due process of law.

That such enactment, if given effect, would deprive the above named defendant, Central Lumber Company, of property without due process of law.

That such enactment, if given effect, would deny the above named defendant, Central Lumber Company, equal protection of the laws.

That such enactment is not equal or uniform in its provisions.

9 That such pretended enactment does not apply equally to all persons similarly situated.

That such pretended enactment is class legislation.

3. That the act of the legislature of the state of South Dakota under which this information is filed, relating to unfair competition and discrimination, and entitled:

"An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto,"

approved March 5, 1907, is violative of the constitution of the United States, and consequently null and void.

4. That the act of the legislature of the state of South Dakota under which this information is filed relating to unfair competition and discrimination, and entitled:

"An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto,"

approved March 5, 1907, is violative of the constitution of the United States, and consequently null and void, for the several reasons, among others.

That such enactment, if given effect, would deprive the above named defendant, Central Lumber Company, of liberty without due process of law.

That such enactment, if given effect, would deny the above named defendant, Central Lumber Company, equal protection of the laws.

That such enactment, if given effect, would abridge the privileges and immunities of the above named defendant, Central Lumber Company, as a citizen of the United States.

5. That the act of the legislature of the state of South Dakota under which this information is filed, relating to unfair competition and discrimination, and entitled:

"An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto,"

approved March 5, 1907, is violative of the fourteenth amendment to the constitution of the United States, which is as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,"

for the several reasons that if said enactment is given effect as against the above named defendant, Central Lumber Company, it will:

(a) Deprive said defendant of liberty to contract.

(b) Deprive said defendant of property without due process of law.

(c) That said statute is not equal or uniform in its provisions.

(d) That said statute does not apply equally to all persons similarly situated.

(e) That said statute is class legislation.

(f) That said statute is not a valid exercise of the police power of the state of South Dakota.

The court overruled said objection; to which ruling the defendant then and there excepted, which exception was allowed by the court.

It was then and there stipulated in open court between the parties that all of the evidence of the witness then on the stand, and each

11 and every part thereof, if admitted, shall be admitted subject to the objection last above made, and that all documentary evidence, and evidence of every kind offered, should be received, if at all, under said objection; and that the defendant should be deemed as excepting to the rulings of the court in receiving the evidence of each and every witness and of documentary evidence in said case.

The plaintiff then introduced evidence to the jury, tending to prove all the allegations of the information filed in said cause.

To the reception of all of said evidence and every part thereof, the defendant objected for the same reason and upon the same grounds as hereinbefore stated in the first general objection to the introduction of evidence; and to the action of the court in permitting such evidence to be given, the defendant then and there excepted in each and every instance, which exceptions were allowed by the court.

At the close of the testimony the defendant moved the court to advise the jury to return a verdict of acquittal upon the grounds that the testimony is not sufficient to justify a conviction for the reasons specified in the defendant's objection to the introduction of any evidence under the information; but the court overruled said motion, to which ruling the defendant then and there excepted; and thereupon the court gave the following instructions to the jury:

Gentlemen of the jury: This is an action by the state of South Dakota against the Central Lumber Company, a corporation. The information in this case charges, in substance, and you have heard it read, that in the month of September, about the 22d of Septem-

12 ber, 1908, the defendant was a corporation duly organized, that it was engaged in business in this state, and particularly at the towns of Leola and Ipswich in this state, that it was engaged in the sale of lumber and building material, that the Mitchell Lumber Company is a corporation doing business in this state engaged in a similar business in the town of Leola, and that the defendant corporation, being engaged in the sale and distribution of lumber and building material in the town of Leola, McPherson county, South Dakota, did willfully, wrongfully, unlawfully and intentionally and for the purpose of destroying competition of a regularly established dealer in such commodity then engaged in like business in the town of Leola, McPherson county, South Dakota, co-wit: the Mitchell Lumber Company, a corporation duly organized and existing under and by virtue of the laws of the state of South Dakota, discriminate between different sections and communities of the state of South Dakota, to-wit: at the town of Leola, McPherson county, South Dakota, and the town of Ipswich Edmunds county, South Dakota, by selling such lumber and building material at a lower rate in the town of Leola than was charged by the said Central Lumber Company for said lumber and building material in the town of Ipswich, Edmunds county, in this state, after equalizing the distance from the point of production, manufacture and distribution and freight rates therefrom.

The burden is upon the state in this case to prove every material allegation in the information.

The law of this state upon this subject is as follows, in so far as it relates to this case and your duties:

"Any person, firm or corporation, foreign or domestic, doing business in the state of South Dakota, and engaged in the production, manufacture or distribution of any commodity in general use, that intentionally, for the purpose of destroying the competition of any regular established dealer in such commodity, or to prevent the competition of any person who in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities or cities of this state, by selling such commodity at a lower rate in one section, community or city, or any portion thereof, than such person, firm or corporation, foreign or domestic, charges for such commodity in another section, community or city, after equalizing the distance from the point of production, manufacture or distribution, and freight rates therefrom, shall be deemed guilty of unfair discrimination."

And another section of this law provides that:

"Any person, firm or corporation violating the provisions of this act, shall, upon conviction thereof, be fined." The parts as to the punishment is not for the jury, and therefore I will not read that to you.

Now, in the first place, I instruct you, gentlemen of the jury, that as far as this court is concerned this is a valid law of this state and not opposed to the constitution.

This is a criminal case, and I instruct you that the defendant in a criminal action is always presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether or not his guilt is satisfactorily shown, he is entitled to be acquitted.

This law only aims to prevent unfair competition made with the intent and purpose of destroying competition. It is not the aim of the law to discourage legitimate competition, or to encourage trusts or the one price or pooling system, for the law recognizes the commercial principle that competition is the life of trade and 14 is just as fully and strongly opposed to trusts or any arrangement in restraint of trade as it is to unfair competition, the chief object of the law being to insure free and fair competition.

If you are satisfied from the evidence, beyond a reasonable doubt, that the defendant is a corporation doing business in this state in the sale and distribution of lumber and building material, that the Mitchell Lumber Company is a corporation and was, at the time named, a regularly established dealer in a like commodity in Leola, and if you are satisfied from the evidence beyond a reasonable doubt that this defendant company with the intent and for the purpose of destroying the Mitchell Lumber Company as a competitor, did in the month of September and prior to the 28th day of that month, 1908, sell lumber or other building material at Leola at a lower price than it charged and obtained for like material at Ipswich, in this state, after equalizing the distance from the point of production or distribution and freight rates therefrom, then you should return a verdict of guilty as charged in the information.

On the contrary, if you are not so satisfied, you should return a verdict of not guilty.

There can only be two verdicts in this case. One would be, "We the jury, find the defendant guilty as charged in the information," or "We, the jury, find the defendant not guilty."

You are the judges of the facts in this case, gentlemen, and I will not attempt to review the evidence.

When you have retired to your jury room you will select a foreman, and when you have agreed upon a verdict you will notify the officer and he will report that fact to the court. Your verdict need not be in writing. It will simply be announced by your foreman when you return to the jury room, orally.

15 And to the foregoing instructions, in the presence of the jury, and at the proper time, the defendant took the following exceptions:

1. To the instruction of the court to the jury in the language or substantial language of the statute, Chapter 131, which amounted to a reading of or a statement of the substance of the chapter.

2. To the submission to the jury for their consideration the question of whether or not the defendant had sold the commodity in question cheaper at one point than at another.

3. To the submission to the jury for its consideration of the question of the intent of the defendant in the action which the jury might find it had taken.

4. The instruction of the court to the jury as to the purpose or object of the law and that the jury might inquire into the purpose or object of the law.

5. To the instruction to the jury that if satisfied that defendant had with intent to destroy competition sold cheaper at Leola than Ipswich, the jury were at liberty to find the defendant guilty.

6. To the instruction to the jury that it might return a verdict of guilty.

7. The defendant further excepts to the instruction of the court, in substance, to the jury, that so far as this statute in this court is concerned it is a valid law of this state.

The purpose of the foregoing several exceptions to the instructions of the court to the jury being only to challenge the validity of the statute in question, upon the grounds of the defendant's first above objections to the introduction of any evidence.

And thereafter the jury retired for deliberation, and after such deliberation, returned into court with the following verdict:

16 "We, the jury, find the defendant guilty as charged in the information."

Which verdict was properly entered in the records of the court.

And thereafter the defendant moved the court to arrest the entry of judgment in said cause, and that no judgment be entered, for the following reasons:

1. That the facts stated in said information do not constitute a public offense.

2. That the facts stated in said information do not constitute a public offense, for the several reasons, to-wit:

(a) That the act of the legislature of the state of South Dakota under which this information is filed, relating to unfair competition and discrimination, and entitled:

"An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto," approved March 5, 1907, is violative of the constitution of the state of South Dakota, and consequently null and void.

(b) That the act of the legislature of the state of South Dakota under and by virtue of which this information is filed, relating to unfair competition and discrimination, and entitled:

"An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto,"

approved March 5, 1907, is violative of the constitution of the state of South Dakota, and consequently null and void, for the several reasons, among others:

That such enactment, if given effect, would deprive the 17 above named defendant, Central Lumber Company, of liberty without due process of law.

That such enactment, if given effect, would deny the above named defendant, Central Lumber Company, equal protection of the laws.

That such enactment is not equal or uniform in its provisions.

That such pretended enactment does not apply equally to all persons similarly situated.

That such pretended enactment is class legislation.

3. That the act of the legislature of the state of South Dakota under which this information is filed, relating to unfair competition and discrimination, and entitled:

"An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto,"

approved March 5, 1907, is violative of the constitution of the United States, and consequently null and void.

4. That the act of the legislature of the state of South Dakota under which this information is filed, relating to unfair competition and discrimination, and entitled:

"An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto,"

approved March 5, 1907, is violative of the constitution of the United States, and consequently null and void, for the several reasons, among others:

That such enactment, if given effect, would deprive the 18 above named defendant, Central Lumber Company, of liberty without due process of law.

That such enactment, if given effect, would deprive the above named defendant, Central Lumber Company, equal protection of the laws.

That such enactment, if given effect, would abridge the privileges

and immunities of the above named defendant, Central Lumber Company, as a citizen of the United States.

5. That the act of the legislature of the state of South Dakota under which this information is filed, relating to unfair competition and discrimination, and entitled:

"An act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the attorney general in regard thereto,"

approved March 5, 1907, is violative of the fourteenth amendment to the constitution of the United States, which is as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws."

for the several reasons that if said enactment is given effect as against the above named defendant, Central Lumber Company, it will:

- (a) Deprive said defendant of liberty to contract.
- (b) Deprive said defendant of property without due process of law.
- (c) That said statute is not equal or uniform in its provisions.
- 19 (d) That said statute does not apply equally to all persons similarly situated.
- (e) That said statute is class legislation.
- (f) That said statute is not a valid exercise of the police power of the state of South Dakota.

And the court then and there overruled and denied said motion in arrest of judgment. To which ruling the defendant then and there excepted.

And thereafter, on December 16, 1908, the court imposed sentence, adjudging the defendant to pay a fine of \$200 and the costs of said prosecution, in all the sum of \$262.90. To which judgment the defendant then and there excepted.

And thereafter on the 19th day of January, 1909, the defendant moved the court to set aside the verdict in said action, and to grant a new trial thereof, upon the following grounds, to-wit:

Errors in law occurring at the trial and excepted to by the defendant, and specified as follows:

- (a) The court erred in overruling defendant's demurrer to the information.
- (b) The court erred in overruling defendant's objection to the introduction of any evidence under the information.
- (c) The court erred in overruling defendant's several objections to the receiving of the evidence of each and every witness on the part of the plaintiff, and to the receiving of each and every part of the evidence offered on the part of the plaintiff in said action, and received by the court, including the documentary evidence.
- (d) The court erred in denying defendant's motion made at the close of the evidence, to advise the jury to return a verdict of acquittal upon the grounds therein specified.

20

(e) The court erred in giving to the jury the following instruction, to-wit: "The law of this state upon this subject is as follows, in so far as it relates to this case, and upon your duties: 'Any person, firm or corporation, foreign or domestic, doing business in the state of South Dakota, and engaged in the production, manufacture or distribution of any commodity in general use, that intentionally for the purpose of destroying the competition of any regularly established dealer in such commodity, or to prevent the competition of any person who in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities or cities in this state, by selling such commodity at a lower rate in one section, community or city, or any portion thereof, than such person, firm or corporation, foreign or domestic, charges for such commodity in another section, community or city, after equalizing the distance from the point of production, manufacture or distribution, and freight rates therefrom, shall be deemed guilty of unfair discrimination.'"

(f) The court erred in giving the following instruction: "This law only aims to prevent unfair competition, made with the intent and purpose of destroying competition. It is not the aim of this law to discourage legitimate competition or to encourage trusts or the one price or pooling system, for the law recognizes the commercial principle that competition is the life of trade, and is just as fully and strongly opposed to trusts or any arrangement in restraint of trade as it is to unfair competition. The chief object of the law is to insure free and fair competition."

21 (g) The court erred in instructing the jury as follows: "If you are satisfied from the evidence, beyond a reasonable doubt, that the defendant is a corporation doing business in this state in the sale and distribution of lumber and building material, that the Mitchell Lumber Company is a corporation and was at the time named, a regularly established dealer in a like commodity in Leola; and if you are satisfied from the evidence, beyond a reasonable doubt, that this defendant company, with the intent and for the purpose of destroying the Mitchell Lumber Company as a competitor, did in the month of September, and prior to the 28th day of that month, 1908, sell lumber and other building material at Leola at a lower price than it had and obtained for like material at Ipswich, in this state, after equalizing the distance from the point of production or distribution, and freight rates therefrom, then you should return a verdict of guilty as charged in the information."

(h) The court erred in instructing the jury as follows: "Now, in the first place, I instruct you, gentlemen of the jury, that so far as this court is concerned, this is a valid law of this state and not opposed to the constitution."

(i) The court erred in denying defendant's motion in arrest of judgment.

(j) The court erred in pronouncing judgment against the defendant.

And the defendant, before the hearing of said motion, had served upon the plaintiff his notice of intention to move for a new trial,

specifying in said notice as grounds of said motion, errors of law as hereinbefore specified.

And on the 19th day of January, 1909, said motion for a new trial came on to be heard on the files and minutes of said court, 22 and the plaintiff appearing by its attorneys, S. W. Clark, attorney general, and Theo. J. P. Geidt, state's attorney of McPherson county, South Dakota; and the defendant appearing by Brown, Abbott & Somsen and Sears & Potter, its attorneys; and the court being duly advised in said premises, ordered that the said motion for new trial be denied, for the reason that as a matter of law the said defendant was not entitled thereto. And to the said ruling denying said motion for new trial, the defendant then and there duly excepted.

The foregoing proceedings all having been made a matter of record by the bill of exceptions in said cause, signed by the court on the 19th day of January, 1909.

And thereafter, on the 25th day of January, 1909, there was entered of record in the clerk's office of McPherson county the following order denying defendant's motion for new trial, omitting the formal parts thereof:

"On this 19th day of January, 1909, the motion of the defendant for a new trial of said cause, and to set aside the verdict therein, coming on for hearing at Pierre, South Dakota, within the time as extended by the court; and the plaintiff appearing by Theodore J. P. Geidt, state's attorney of McPherson county, and by S. W. Clark, attorney general; and the defendant appearing by its attorneys, Sears & Potter, Brown, Abbott & Somsen, and Seward & McFarland; and the court being fully advised in the premises; it is ordered that said motion and application be denied.

Dated January 19, 1909.

By the Court.

LYMAN T. BOUCHER,
Judge of Said Court.

Attest:

ULRICH REUE, *Clerk.*

Exception.

And it is hereby certified that at the time and place of the hearing of the above entitled motion, the defendant duly excepted to the making and signing of the foregoing order denying motion for said trial, which exception is allowed by the court.

Dated January 19, 1909.

LYMAN T. BOUCHER, *Judge."*

Appeal.

And thereafter, on the 28th day of January, 1909 the defendant in the above entitled action appealed from said order denying new trial, and from the judgment entered in said cause, to the supreme court of the state of South Dakota, by serving on the attorneys for

the plaintiff and the clerk of said court a notice of appeal, specifying that the said defendant appealed from said judgment and from said order and from the whole thereof, to the said court; and also by serving and filing an undertaking in the sum of \$500, conditioned as required by the order of said court, and approved by the judge thereof.

Assignment of Errors.

And the appellant says there is manifest error on the face of the record as follows:

1. The court erred in overruling defendant's demurrer to the information filed in said cause, for the reasons specified in said demurrer.

2. The court erred in overruling the defendant's objections to the introduction of any evidence under the information, for the reasons specified in ~~said~~ objection.

24 3. The court erred in overruling defendant's several objections to every part of the evidence of the several witnesses produced by the plaintiff, and who testified in said action, for the reasons specified in said objections.

4. The court erred in refusing to grant the defendant's motion made at the close of the evidence, to advise the jury to return a verdict of acquittal, upon the ground stated in said motion.

5. The court erred in giving to the jury each and all of the several instructions hereinbefore set out, and excepted to by the defendant, as specified in defendant's motion for a new trial.

6. The court erred in overruling defendant's motion in arrest of judgment.

7. The court erred in passing sentence and rendering judgment in said action.

8. The court erred in denying defendant's motion for a new trial of said action.

SEARS & POTTER,
BROWN, ABBOTT & SOMSEN,
SEWARD & McFARLAND,
Attorneys for Appellant.

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26 In Supreme Court, State of South Dakota, April Term, 1909.
2760.

STATE OF SOUTH DAKOTA, Plaintiff and Respondent,

vs.

CENTRAL LUMBER COMPANY, a Corporation, Defendant and Appellant.

Appellant's Additional Abstract.

Appeal from McPherson County Circuit Court.

Sears & Potter, Brown, Abbott & Somsen, Seward & McFarland, Attorneys for Appellant.

Supreme Court, State of South Dakota. Filed Mar. 4, 1909. Frank Crane, Clerk.

27 In the Supreme Court of State of South Dakota, April Term, 1909.

STATE OF SOUTH DAKOTA, Plaintiff and Respondent,

vs.

CENTRAL LUMBER COMPANY, a Corporation, Defendant and Appellant.

Appellant's Additional Abstract.

The appellant as an addition to his abstract heretofore served, says that the following is the full and complete text of the judgment rendered in the above entitled action, by the circuit court of the county of McPherson, state of South Dakota, on the 16th day of December, 1908, from which the appeal in this case is taken, as stated in the abstract:

28 *Judgment.*

STATE OF SOUTH DAKOTA,

County of McPherson, ss:

In Circuit Court, Sixth Judicial Circuit, December Term, A. D. 1908.

Present, the Honorable Lyman T. Boucher, presiding judge of said circuit court, and the officers of said court.

STATE OF SOUTH DAKOTA, Plaintiff,

vs.

CENTRAL LUMBER COMPANY, a Corporation, Defendant.

Convicted of the Crime of Unfair Discrimination.

This action having been tried by a jury at a regular term of the circuit court, held at the court house in the town of Leola, in said

county, on the 16th day of December, A. D. 1908, before the Honorable Lyman T. Boucher, and the jury having returned a verdict of guilty as charged in the information against said defendant therein, and said verdict having been entered in the minutes of said court; and

Now, on this 16th day of December, A. D. 1908, the state's attorney and defendant come into court, and this being the day fixed by the court for the pronouncing of judgment, upon the conviction of the defendant for the crime of unfair discrimination as charged in the information heretofore filed against said defendant in this court; and it being informed by the court of the nature of the information, and of its plea of not guilty and the verdict, and being asked whether it has any legal cause to show why judgment should 29 not be pronounced against it, and no cause being shown, the court does adjudge and the sentence is that you, the said Central Lumber Company, a corporation, pay a fine of two hundred dollars (\$200), and costs of prosecution taxed and allowed at the sum of sixty-two dollars and ninety cents (\$62.90), which are adjudged against you, amounting together to the sum of two hundred sixty-two dollars and ninety cents (\$262.90).

By the Court,

LYMAN T. BOUCHER, *Judge.*

Attest:

(Filed December 17, 1908.)

[SEAL.]

(Filed December 17, 1908.)

SEARS & POTTER,
BROWN, ABBOTT & SOMSEN,
SEWARD & McFARLAND,
Attorneys for Appellant.

30 2760 "W"—a—
2774 "W"—a—

In the Supreme Court, State of South Dakota.

Two Cases.

STATE OF SOUTH DAKOTA, Respondent.
vs.
CENTRAL LUMBER COMPANY, Appellant.

Appeals from Circuit Court of McPherson County.

Opinion Filed Dec. 1, 1909.

31 Sears & Potter, Brown, Abbot & Somsen, Seward & McFarland, for Appellant.

S. W. Clark, Attorney General, Theo. J. P. Giedt, State's Attorney, McPherson County, James N. Brown, for Respondent.

WHITING, J.:

Chap. 131 of the Session Laws of S. Dak. for the year of 1907 is in words as follows:

"An act to Define and Prohibit Unfair Competition and Discrimination, and to Define the Powers and Duties of the Attorney General in Regard Thereto.

Be it enacted by the Legislature of the State of South Dakota:

§ 1. Unlawful Discrimination.—Any person, firm, or corporation foreign or domestic, doing business in the state of South Dakota, and engaged in the production, manufacture or distribution of any commodity in general use, that intentionally for the purpose of destroying the competition, of any regular, established dealer in such commodity, or to prevent the competition of any person who, in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities, or cities of this state, by selling such commodity at a lower rate in one section, community or city, or any portion thereof than such person, firm or corporation, foreign or domestic charges for such commodity in another section, community, or city, after equalizing the distance from the point of production, manufacture, or distribution and freight rates therefrom shall be deemed guilty of unfair discrimination.

§ 2. Duty of Attorney General.—If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination as defined by this act, he shall investigate such complaint and for that purpose he may subpoena witnesses, administer oaths, take 32 testimony and require the production of books or other documents, and, if in his opinion sufficient grounds exist therefor,

he may prosecute an action in the name of the state in the proper court to annul the charter or revoke the permit of such corporation, as the case may be, and to permanently enjoin such corporation from doing business in this state, and if in such action the court shall find that such corporation, is guilty of unfair discrimination as defined by this act, such court shall annul the charter or revoke the permit of such corporation, and may permanently enjoin it from transacting business in this state.

§ 3. Violation—Penalty.—Any person, firm, or corporation violating the provisions of section one (1) of this act shall upon conviction thereof be fined not less than two hundred dollars nor more than ten thousand dollars for each offense.

§ 4. Remedies Cumulative.—Nothing in this act shall be construed as repealing any other act or part of an act, but the remedies herein provided shall be cumulative to all other remedies provided by law.

The state brought two actions in the circuit court, one criminal charging defendant with having broken the above statute, the other civil seeking under Sec. 2 thereof to forfeit the right of defendant to do business in this state. Demurrs were interposed to both the Criminal Information and Civil Complaint, said demurrs attacking such information and complaint solely upon the ground that they did not allege facts sufficient,—in the one case, to constitute a

public offense, and in the other case, to state a cause of action,—each demurrer being based solely upon the alleged unconstitutionality of the above statute. The demurrers were both overruled. In the civil case the defendant appealed from the order overruling such demurrer. In the criminal case, trial was had and verdict 33 of guilty rendered, judgment entered, motion for new trial made and overruled. The defendant at all times saved his rights by timely objections and motions raising the questions of constitutionality of the said statute, and duly appealed from the judgment of conviction and order denying new trial. It is admitted by the appellant that the only question raised by either appeal, is the said constitutional questions, and they are the only ones saved by assignments of error. The question involved in the two cases on appeal being therefore necessarily largely, if not entirely, the same, by agreement of parties and consent of this court, the two causes have been presented together and will be so decided.

The appellant in its brief has discussed the issues under the following headings:—

“1.

The statute in question is criminal in its nature and penal in its provisions, and must be strictly construed.

“2.

No offense is created by this statute, because, while it defines unfair discrimination, which is in itself no offense, it nowhere forbids it so as to make it a crime.

“3.

This law can not be upheld upon the theory that its purpose and effect is to prevent the establishment of a monopoly.

“4.

The act, by reason of arbitrary classification, denies the defendant equality under the law, and is for that reason violative of the Constitutions, both State and Federal.

“5.

The act is invalid because the classification of corporations by Section 2, and the procedure therein provided for is violative of the Constitutions, both State and Federal.

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“6.

Whether the act can be severed and some parts saved while others are condemned.

“7.

The act interferes with freedom to contract.

The briefs on both sides are very full and exhaustive and are a credit even to the eminent counsel engaged in this case. It will

be impossible for us within the limits of this decision to discuss, in detail, the authorities cited though we have given them careful consideration.

For convenience we will take up the questions raised in order in which they are treated in the appellant's brief.

The appellant, under the first heading, has gone into an exhaustive discussion of the rules of construction applicable to criminal statutes for the purpose of showing, under the second heading, that the courts can not read into the statute, words so that such statute can be held to create an offense under Sec. 3 of the Penal Code which provides,—“A crime or public offense is an act or omission forbidden by law, and to which is annexed, upon conviction, either of the following punishments: * * * 3. Fine. “The point made by appellant being that said statute in question nowhere “forbids” the acts that constitute the offense, and that therefore, under said Sec. 3 Penal Code, there is no offense stated. The state had given this point careful consideration, answering fully the brief of appellant and calling attention further to the fact that this is not a question going to the constitutionality of the statute and therefore not properly before us. The state is right in this contention, but in as much as the point has been fully discussed and is a matter vital to the people of this

state, we consider ourselves justified in considering and passing on the same. We have just recently affirmed a judgment 35 imposing the death penalty for murder, and, if appellant is right in its contention, we have no such crime as murder in this state, the statute relating thereto containing no specific words forbidding the acts constituting the offense; and under Sec. 2 of our Penal Code no act or omission is a crime except as prescribed by some statute of this state. In fact if appellant was right, there would be scarcely a criminal offense provided for by our code and our jails and state's prison- should be emptied of the persons confined therein. Nevertheless it is true that, if there is nothing in the body of the statute before us that forbids the doing of the acts set forth in Sec. 1 thereof, appellant is right and has not committed any criminal offense. Conceding for the purposes of this discussion that no reference can be made to the word “prohibit” found in the title, to aid in upholding the law; and conceding likewise that nothing can be read into this statute in aid thereof, and that we must look to the plain language of the statute for the prohibition of the said acts; and even disregarding Sec. 10 of our Penal Code providing: “The rule of common law that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and promote justice”; still does not Sec. 3 of said statute plainly prohibit the acts set forth in Sec. 1 by prescribing a punishment therefor? It certainly does. One man might say to his child: “To break Mr. Jones' windows is wrong and I forbid your doing it.” Another man says to his child: “To break Mr. Jones' windows is wrong and if you do it I will whip you.” Does it need any legal research or extended study of statutory construction, for the 36 second child to determine that he, as well as the other child, is forbidden to do the acts constituting the wrong? We think

the second child would have a clear comprehension of the law of his home on this subject, and would hardly be in a position, after having broken *ghe* windows, to say to his father, "I did not know you forbade me to break the windows, you did not use the word "forbid." In fact, if these two children were of very tender years, might it not well be that the first child, not knowing the meaning of the word "forbid," could well plead innocence, while, if his father had used the language of the other parent, he could not have so plead because he then would have known the fact that he was forbidden while not knowing the meaning of the word "forbid?" Lawmakers should certainly be free, in the preparation of criminal statutes designed to control the actions of persons who have reached the age of criminal responsibility, to use the simple method of conveying an idea or thought, which would be applicable in conveying such idea or thought, to a child of tender years. Our legislature has universally followed this common sense method.

In State vs. Ostwalt (N. Car.) 24 S. E. 661 the court said: "It seems never before to have been doubted that the legislature creates a criminal offense whenever it prescribes that a certain act shall be punishable either by fine or imprisonment, or forbids it generally and by implication empowers the court to impose either fine or imprisonment."

Section 15 of the Penal Code of California is in substance the same as Sec. 3 of our Penal Code, it reading as follows: "A crime or public offense is an act committed or omitted in violation of law forbidding or commanding it, and to which is annexed, upon conviction, either

37 of the following punishments: * * * third, fine." In the case of Dyer vs. Placer County (Cal.) 27 Pac. 197 the court was called upon to determine whether in the light of such section a public offense was created by a statute reading as follows: "Every person who shall fraudulently evade, or attempt to evade, the payment of his fare for travelling on any railroad, shall be fined not less than five nor more than twenty dollars." The court after quoting Sec. 15 of their Penal Code supra, well said: "To hold that a law which makes it a finable offense to fraudulently evade the payment of railroad fare does not make such evasion a public offense, would, we think, be going but skin deep into its meaning, *qui haeret in litera, haeret in cortice.*"

Before taking up the consideration of those questions raised by appellant which involve the constitutionality of the law before us, it may be proper to consider briefly: the purpose in the minds of the legislators in framing the law in question, and in connection therewith the evil sought to be cured; and finally whether such evil brings the remedy within that great body of laws known as police regulations. The great and only excusable reason for the prescribing of any rule of conduct, is to promote justice between man and his fellows, in their relations as members of a social or political body. As was well said by Webster: "Justice is the greatest thing on earth." Law may be defined as the aggregate of those rules and principles of conduct promulgated by the legislative authority or established by local custom, and our laws are the resultant derived from a com-

bination of the divine or moral laws, the laws of nature, and human experience, as such resultant has been evolved by human intellect influenced by the virtues of the ages. Human laws must therefore of necessity continually change, as human experience shall prove

38 the necessity of new laws to meet new evils or evils which have taken upon themselves new forms, or as the public conscience shall change thus viewing matters from a different moral view point.

The effort to promote and effectuate justice by means of human laws has been a continuous fight against human selfishness, especially human avarice and greed, a continual effort to protect the weak against the strong. It is the boast of our law that it protects its wards in the full and free enjoyment of their lives, their liberties and their property; and the cry that is always heard when any law is attacked on constitutional grounds, is that it has, in some manner and to some degree, wrongfully deprived some one of equal protection in those cherished rights of life—liberty and property. Yet common sense as well as experience has taught us, that only through restraint can there be liberty, that as members of one great social order, we can only be protected in our most treasured rights by, at the same time, being restrained in the use of the same so as not to deprive our fellow man of the equal enjoyment of such rights. Thus men have often been deprived of property, liberty and even life, taken by the strong arm of law as a forfeit, a penalty, for having infringed on the rights of their fellows.

Among those things which human experience and the public conscience early recognized as essential and necessary to the highest welfare of all, was the right of free and equal competition in the struggles of life; not the right of freedom to crush one's fellows by force of brute strength or the equal brute force of greater wealth or power, but the right to have brute force, wealth and power so restrained as to place the weakest, poorest and lowliest on a free equality, before the law, with the strongest, richest and most powerful. From an early date there have been laws against con-

39 tracts and combinations in restraint of trade, and such laws became a part of the common law of this country. While practices in conflict with such laws have, at all times, been more or less frequent, yet owing to industrial conditions existing up to the past fifty years, such practices had never become any serious menace to the rights of mankind; but with the wonderful advance in industrial pursuits, and the vast accumulations of wealth during the past half century, there came new methods of business, including vast combinations to control the articles of commerce, bringing an awakening of the public conscience to the evils thereof, and, as a result, many statutes were enacted and even amendments to constitutions adopted, aiming to the restoration of freedom and equality in commerce. The evils experienced being almost entirely those flowing from monopolies created through combinations, there were enacted what are known as the anti-monopoly statutes, not merely making such combinations in restraint of trade unlawful from a civil point of view, but making such combinations criminal. Thus

this state passed its laws of 1890, 1893, 1897 and 1899 and adopted in 1896 Sec. 20, Art. 17 of the Constitution, which section provides as follows: "Monopolies and trusts shall never be allowed in this state and no incorporated company, co-partnership or association of persons in this state shall directly or indirectly combine or make any contract with any incorporated company, foreign or domestic; through their stockholders or trustees or assigns of such stockholders, or with any copartnership or association of persons, or in any manner whatever to fix the prices, limit the production or regulate the transportation of any product or commodity so as to prevent competition in such prices, production or transportation or to establish excessive prices therefor.

40 The legislature shall pass laws for the enforcement of this section by adequate penalties and, in the case of incorporated companies, if necessary for that purpose may, as a penalty, declare a forfeiture of their franchises."

The statutes of most states, up to very recent years, were aimed only at monopolies brought about through combinations so that, in treating of the subject of monopoly, both text book writers and judges have spoken of them as though monopoly and combination were one and the same, thus causing many to consider that there could be no monopoly except there was combination, while, as a matter of fact, combination is simply a means, and but one or many means, by which a monopoly is acquired.—monopoly being the end sought, combination a means therefor. It is well to consider the definition of monopoly as given by Webster: "1. The exclusive power, right, or privilege of selling a commodity; the exclusive power, right or privilege of dealing in some article, or trading in some market; sole command in the traffic in anything, however obtained, as, the proprietor of a patented article is given a monopoly of its sale for a limit time: * * * a combination or traders may get a monopoly of a particular product."

A Glance at the above quoted provision of our constitution will show that it is aimed at all monopolies, while it calls attention particularly to those acquired through the then prevalent method.

While our law makers and courts were busy trying to cure the evil of monopoly by destroying combination created therefor, human ingenuity, prompted by avarice and greed, was also busy devising methods of evading the law and creating a monopoly without combination, and the brains at the head of the most powerful corporations known to mankind soon discovered a way. Every 41 person of mature years well knows the success that has attended their efforts along this line and the result thereof.

To get rid of competition and thus acquire a monopoly, the man, firm or corporation, possessed of, or controlling large capital, no longer said to his competitor: "let us combine and thus obtain a monopoly of the business we are engaged in, and, by so doing, increase our profits by raising prices to the consumer." No, that would be criminal, and might lead to trouble, and too it was a crude way of acquiring the thing sought; now he says to a competitor, if such competitor be weaker than he, "get out of my way, sell me your

business, or I will destroy it by unfair competition;" or in many cases, without giving his victim a chance to sell to him the business he has, he sets about destroying it and by a method as certain as the passing of time, a method that need bring to him not even an immediate financial loss. He puts the price of the commodity handled, so low, at the point where his victim is in business, as to make it impossible to meet such price except at a loss, and, to offset what loss he suffers at that point he raises prices at one or more other points.

As soon as this practice became quite prevalent, the public realized that an old evil was being brought upon them by a new method; a method that not only tended as its natural and necessary result to place a monopoly into the hands of the strong, but did not, as before, permit the competitor to share in the fruits of the wrong,—

42 an evil bringing loss to the public and wrong and injustice to the weak tradesmen. Again human experience, recognizing the laws of God and nature, controlled and guided by an aroused public conscience evolved a new law, and placed it upon the statute books of this and many other states, a law aimed at monopolies obtained through unfair competition. The question before this court, as it was before the court in case of State vs. Drayton, Art. 17, N. W. 768, is,—are these laws constitutional as being within the scope of the police powers or is the state helpless to grapple with and destroy this new evil, because in so doing it will take from the wrong doer the full enjoyment of right to life, liberty and property? We have no hesitancy in saying that this class of legislation comes directly within the intendment of Sec. 20, Art. 17 of our Constitution, and that there is nothing in the third point raised by appellant that: "This law cannot be upheld upon the theory that its purpose and effect is to prevent the establishment of a monopoly".

We not only believe it can be upheld upon the above theory, but also that it comes under the scope of proper police regulation as recognized by the authorities, and this, not only because it is intended, and would naturally tend to prevent a wrong to the public, but because we believe it is inherent in the powers of the state, to protect one citizen against "unfair competition" of another citizen where such "unfair competition" is used as a means to, and with the intent to deprive such other of his rightful enjoyment of property or the use thereof. Can it be held that this evil which threatens the very foundations of our economic system, and through it, the very foundations of a free government, cannot be reached, for the reason, forsooth, that it interferes with the right of free contract on the part of the individual guilty of the wrongful practice?

43 Bear in mind at all times that this law is aimed only at persons who resort to such "unfair" methods with the "intent" to destroy the business of their competitors.

The legislature recognized the evil and acted with full knowledge of the necessity confronting it, and shall we say that it has exceeded its powers in passing a law of this nature? As said by the Court in State vs. Drayton *supra*: "At the beginning of our investigations we are confronted with the oft-repeated and well-settled doctrine that

no act of the law-making power of the state can be held unconstitutional unless it is clearly violative of the provisions of the Constitution; that, if it is legally possible to sustain legislative enactments, they should not be held void. We are further met with another well-known rule that what is known as the police power is inherent in every government, and does not depend upon legislative grants or limitations. Then unless the act under consideration is open to attack as in violation of the written provisions of the fundamental law, or an illegal effort to extend the police power over a subject which cannot be brought within the rightful exercise of that power, the law must be sustained. It must also be remembered that with reference to the latter subject the legislative department of the state, within well-known and well-defined limitations, is the sole judge as to when and how that power is to be exercised. From a careful reading and study of the act in question, we are driven to the conclusions that it is not subject to attack upon either of the grounds named." In the above case the court quotes from the words of the judge in *Yick Wo vs. Hopkins*, 118 U. S. 370, words which are as true as they are burning. "The very idea that one man may be compelled

44 to hold his life, or the means of living, or any material rights essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself". And again in the Neb. case we find quoted the following words also coming to us from that great tribunal in the decision of the Sinking Fund cases 99 U. S. 700: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. * * * The power which the legislature has to promote the general welfare is very great, and the discretion which that part of the government has in the employment of means to that end is very large."

Many attempts have been made to define the term "police power" as applied to legislation. Justice Shaw in the case of *Com. vs. Alger* (Mass.) 7 Cush. 53 said: "It is much easier to perceive and realize the existence and source of this power, than to mark its boundaries, or prescribe limits to its exercise." However in the same case this great jurist gave what is perhaps the best definition ever attempted, defining it as: "The power vested in the legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same."

The law books are full of cases where parties have been restrained from "unfair competition", or have been mulched in damages for such "unfair competition", in the use of another's trade mark or trade name, or in the use of trade marks and trade names similar to those which had been in use and established by another, and even where the trade name was the name of the party trying 45 to use same. *Internat. Silver Co. vs. Rogers Corp.* (N. Y.) 3 Am. & Eng. An. Cases 30. And most of the states have

passed statutes regulating the use of such trade names or trade marks, some even going so far as to make the wrongful use of same criminal, and such statutes are constitutional. The Supreme Court of California in the case of Weinstock, Lubin & Co. vs. Marks, 30 L. R. A. 182, held a mandatory injunction proper to prevent a party from continuing a store which he was conducting in a building built by the side of a competitor's place of business,—it appearing that he had built it to nearly or quite resemble the other in appearance, and was using on the outside a trade-mark which had been adopted previously by the other store, and was failing in any manner, to designate his store from his competitor's,—it further appearing that this was being done with intent to draw trade from the competitor. The court said: "It may be said that the adjudged cases for relief are based solely upon the ground of loss and damage to the tradesman's business, by unlawful competition."

The law in question is certainly constitutional, unless it in some manner conflicts with some express provision of our constitution or that of the United States, and this brings us to the fourth point suggested by appellant that:

"The act, by reason of arbitrary classification, denies the defendant equality under the law, and is for that reason violative of the constitutions, both state and federal."

It is the claim of appellant that the law in question violates Sec. 1, Art. 14, of the Federal Constitution and Secs. 2 and 18, Art. 6, of the constitution of this state; said sections of the state constitution

being in substance the counterpart of the provisions found 46 in the Federal Constitution. Appellant has argued at great length and cited numerous authorities upon the question of what constitutes proper classification in criminal statutes, but under the view which we take of the statute now before us, it is unnecessary to determine what the proper rules for such classification are and attempt to apply them to the provisions of this statute, for the reason that it appears clear to us that there is absolutely no attempt at classification in this statute.

The Nebraska statute was attacked upon this same ground in the Drayton case above mentioned, and like arguments were presented to that court as are presented to us. That court, in answer to the claim that there was an arbitrary classification directed against the man having stores in more than one place and in favor of the single store-keeper, said: "To this we must be permitted to say that we are unable to find any provision in the act which is susceptible of the construction contended for". That court then proceeded quite briefly, to draw illustrations in support of its conclusions. The appellant herein referring in its brief to the Drayton case says: "The Nebraska court does not seem to have seriously considered the question of classification involved there and here". While we believe the reasoning in the Drayton case is sound and that we might rest this decision, as regards this feature of the case, upon a mere approval of the Drayton case, yet we feel justified in attempting, somewhat more fully than did the Nebraska court, to show the weakness of appellant's contention.

Appellant says that the following persons are without the law:

"(A) Persons who sell at one place only.

47 (B) Persons who sell at two or more places, but who, with the intent and purpose of destroying a competitor at one of such places, makes the same low prices which are necessary so to do at both places.

(C) Persons who sell at two or more places and who, with the intent and purpose of destroying a competitor at each place makes the necessary low prices at all places."

A complete answer to this contention is, that the persons above specified are without the law, not because they are left out by any classification created by such law, but rather because in each of said cases there would be lacking one of the elements going to make up the particular criminal act created by this statute, to-wit, discrimination between two points. As we have said, there is no attempt at classification by this act. The only classification claimed by appellant is a classification as to persons, yet this law applies to every existing person, partnership or corporation without regard to wealth, age, situation, color or any other method of distinction. In the determination of whether a crime has been committed, there are always these two things at least to be considered: first,—the persons committing the offense; and second,—the acts constituting the offense. As to the first there may be such a classification by the statute as will render such statute unconstitutional; but not so as regards any restriction or limitations as to the acts constituting the offense. Let us illustrate. While the legislature could not make some particular class of persons guilty of murder, when such persons killed their fellow man by some peculiar method or means, and, at the same time, exempt another class of persons from punishment for killing their fellow-man by the same method or means, unless the attempted classification had some logical or natural relation to the

48 nature of the method or means employed; yet it would be clearly within the power of the legislature to make such killing, by such peculiar method or means, murder, even if the legislature should utterly fail to pass any law whatsoever making killing by any other means or methods a crime.

The appellant in his brief says: "This law in order to be sustained must be brought within the principle that no man ought to be allowed to use his own property or conduct his own business so as to destroy the property or business of his neighbor; if such were the scope of the act, the only question would then be whether it was an unwarranted restraint upon the liberty of contract.

The evil, if any, which this law is aimed at, is not discrimination between places, but ruthless competition with the purpose on the part of one competitor to utterly destroy the business of another." In this the appellant is only in part correct, the object of this law is not only the protection of the competitor, while this is without question one of the objects the legislature had in mind, yet undoubtedly the prime object was the protection of the public against monopoly.

At another place in its brief the appellant,—after referring to the principle of law that courts are not bound by the mere form of

pretense of a statute, but that it should look at the substance thereof to see whether the same is really what it purports to be, and whether, while purporting to be within some constitutional limitation, as within the police power, it is not in fact an invasion of some constitutional provision,—says: “Applying this principle, we are warranted in saying that the aiming of this statute at the socalled unjust discrimination, is a shallow pretense, and that the so-called unjust discrimination relates to the persons and not to the act, and is in fact a classification of such persons; that the act of discrimination cannot of itself be within the prohibitive police power of the state, and that the act of malicious competition, if it be a violation of the principle that every citizen must so exercise his own right as not to injure another, is nevertheless an evil under all circumstances, and that if the legislature may prohibit at all it must do so by a statute which is not void by reason of arbitrary and unreasonable classification of the persons upon whom it operates.”

Again it seems to us that the appellant is shooting wide of the mark. It is resting on an alleged arbitrary classification of persons based upon their conditions, and yet, in the words above quoted, it will be seen that what it is now complaining of is not, that the law does not reach all persons, but rather that the law does not reach all the means which may be used to bring about the wrong aimed at.

It may be well again to revert to the history and origin of this legislation. Legislation of this class, including as it does the so-called anti-monopoly laws, is all directed to the prevention of monopoly. Monopoly and competition being the exact opposites, anything tending to destroy competition tends toward monopoly. As we have stated, at the time the statutes against unlawful combinations in restraint of trade were passed, that was the only means or method of creating monopolies that had come into such common use as to be recognized as a public menace. While those statutes forbid “combinations and contracts” of certain kinds, they were forbidden, not because “combinations and contracts” were in themselves subjects for police regulation, but were forbidden merely as they might be used as a method or means of creating a monopoly, laws against monopolies being within the scope of police regulation. So it is in the case of the statute before us, mere “discrimination” is not the thing aimed at, nor even “unfair competition,” but the evil sought to be prevented is monopoly, and the legislature is merely condemning that class of “discrimination and competition” which experience had taught the public, tended to bring about monopoly, and which was then being frequently resorted to for that purpose and had become a public menace. But appellant says that “malicious competition,” if an evil, is such under all circumstances, and, if it is to be prohibited at all, it must be by statutes reaching all methods, thus reaching all who are guilty of “malicious competition,” that otherwise there is an arbitrary and unreasonable classification of persons upon whom the law operates. If such position is sound, then the laws enacted

against combinations and trusts are unconstitutional for the same reason, and the same plea could be raised against them, that they did not reach all who were guilty, that inasmuch as the object of such laws was to prevent monopolies, and there being many other means by which monopolies could be created,—such as the different kinds of unfair competition,—such laws are unconstitutional; it being arbitrary classification to attempt to say to the man who enters into a combination in restraint of trade: "you are guilty of seeking to obtain a monopoly," while at the same time saying of the man who crushes his competitor and thus obtains a monopoly: "you may go free as you are guilty of no offense."

It is not for the courts to say whether the legislature has passed a wise law, or whether they should have made it more broad. With shrewd advisors to point out to their clients new methods 51 by which monopolies may be obtained without breach of existing laws, it may happen that the legislature will soon see the necessity of passing new legislation reaching the conditions suggested by appellant in illustrations "A," "B" and "C," above referred to. That is for the legislature to determine. Experience, so far, has taught us, that, while such acts set forth in "B" and "C" may be morally wrong, there is no great public menace from the same, for the reason that parties do not so frequently resort thereto under the circumstances suggested, owing perhaps to the certainty of immediate loss and the uncertainty of the parties being able to recoup such loss. Legislatures therefore have disregarded any public danger from such conditions, and have left the individuals to their remedy on the civil side of the courts.

Human experience taught that there was much greater danger to the public, when three or more persons acted together in the unlawful use of force and violence, than when only one or two committed the same acts, the result was, that the legislature passed the statute prescribing what constituted a riot. Under the provisions of our statute, if three or more persons acting together and carrying deadly weapons should commit an assault, they could be punished by ten years' imprisonment, and this even though the weapons were not used in making the assault; yet, if one or even two persons carrying such weapons committed an assault identical in nature, they could only be punished by a fine of \$100 or 30 days in jail or both. Was it wise to draw the line at three men and make such a distinction? The legislature thought it was, and could any defendant charged with riot say that the law was unconstitutional, that there was an arbitrary classification in that it made it a greater crime for one to act with two or more, than for one to act 52 alone or with one other? Again there can be no conspiracy without there are two or more engaged therein, but would our statutes defining criminal conspiracy have necessarily provided that when two conspire to do a wrongful act it should be a crime, or could not the lawmakers, if they had thought best, have placed the number at three or four or any other number? It seems to us perfectly clear that the same legal proposition is involved in the statute at bar, and in statutes such as those relating to riot and con-

spiracy. There is no classification as to persons, but rather a limitation and specification of the elements and acts surrounding, or conditions with the wisdom or propriety of which courts have nothing whatever to do.

The plea of appellant in its final analysis is: "I am guilty of the acts condemned by your lawmakers, but there are other rascals who do these same things by other means, and you can not punish me unless you punish them." The acts condemned by this statute do not reach the sole dealer mentioned in appellant's illustration "A" because it would be impossible for him to commit the offense; it does not reach those mentioned in "B" and "C" because, fortunately perhaps for them, whether wisely or not, the legislature has not barred at least one door through which wrong may enter, though such bars as it has erected, bar all alike.

This brings us to the next point raised in appellant's brief, to-wit:

"The act is invalid because the classification of corporations by section 2, and the procedure therein provided for is violative of the constitution, both state and federal."

The appellant has argued at great length that the law cannot punish the corporation differently than it punishes an individual.

and contends that this law before us attempts so to do. It
53 seems to be very much wrought up over the alleged fact that upon domestic corporations there is imposed the "death penalty," and upon foreign corporations "banishment" in addition to the punishments provided against individuals. Again it seems to us, the appellant has entirely failed to recognize the questions of law involved herein. What it claims to be an additional penalty imposed against the corporation is really the voluntary forfeiture by it of its franchise or permit, the statute containing a provision for the determination by the proper court whether, in any case the implied contract existing between it and the state has been broken and its right to existence forfeited. Let it not be understood that this court admits that there can be no different punishment for a criminal offense imposed against a corporation than that imposed against an individual. We are of the opinion that there can be such a classification of punishment, the same as there can be different punishments imposed as against different individuals, if such distinction in punishment is based upon reasonable grounds having relation to the crime and nature and condition of parties. *People ex rel. Duntz vs. Coon (N. Y.) 67 Hun. 523.*

A complete answer to appellant's contention regarding forfeiture being an additional punishment and unconstitutional, is found in Sec. 20 of Art. 17 of the constitution of this state herein before quoted in full. An examination of such section will show that, in the class of cases covered by such section, the legislature is not only fully authorized to enact a law like Sec. 2 of the statute before us, but it is directed to do so in certain cases; and whether or not the wrongful acts set forth in Sec. 1 of this statute are sufficient
54 to justify the legislature, under said constitutional provisions, in the enactment of Sec. 2 of this statute, is certainly a mat-

ter peculiarly within the right of the legislature to determine; and having by the passage of this section, determined that the doing of the acts forbidden are sufficient to warrant the forfeiture of the franchises and permits of corporations, there is nothing left to the court but the absolute duty to enforce such provisions of said section.

But regardless of said Sec. 20 of Art. 17 of the Constitution of this state, there can be no question of the constitutionality of the section now before us. While it is true that corporations are entitled to the equal protection of the law, yet there is one thing that we should never lose sight of,—the inherent rights of a corporation are entirely separate and distinct from those of a natural person. A natural person does not seek entry into this world, and he is born into the world with all of the inalienable rights of man, rights not given to him by any earthly power, but by his creator; which rights he retains undiminished except in so far as he may surrender them for the good of the public, and which rights governments are instituted to secure. A corporation comes into existence through its own volition and upon its own seeking; it has not even the right of existence inherent in itself; it has only such rights as man gives to it. As was said by Justice Brown, In Hale vs. Henkel, 207 U. S. 43:—"Upon the other hand, the corporation is the creature of the statute. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and limitations of its charter." In brief man was not created for corporations, but

55 corporations were created for man; and the only excuse that can ever justify the creation of this artificial person is that that through it the public shall receive some benefit. As was said by Justice Weaver in McGuire vs. C. B. & Q. R. Co., 108 N. W. 911: "The distinction between them is fundamental and ineradicable. The natural person has certain inalienable rights for which he is not indebted to organized society. He is born to them. The constitution and the laws recognize them and provide safeguards for them, but do not create them. The corporate person has no rights except those with which it is endowed by the law-making power, and the power of creation necessarily implies the power of regulation."

At the creation of every corporation, in consideration of the rights and powers given to it by the state, there is the implied covenant or agreement, on the part of such corporation, that it will use the powers given it to the benefit of the public; and as an incident to such implied agreement, there is attached the condition that, in case of a serious breach of such implied covenant and agreement, the corporation shall forfeit its right to exist, it having ceased to be of public benefit. So by the common law, it was early recognized that corporations may forfeit their charters by the misuser thereof. It was also a part of the common law that, while corporations so forfeit their charters, such question of forfeiture could not be raised collaterally, and that in order to make such forfeiture effective against the corporation it was necessary for some court to adjudge the forfeiture. Angell and Ames on Corporations, 10 Ed., Sec. 774; 2

Kent's Com., star paging 306 and 313; Lombard vs. Stearns, 4 Cushing 60; Mumme vs. Potomac Co., 8 Pet. 187; State vs. Minnesota Central Railway Co., 36 Minn. 246. This forfeiture under the common law could arise only in case of some wrong-doing affecting the public, but it was not necessarily such a wrong as constituted a crime. The states recognized this right of forfeiture and many, if not all, have passed statutes similar to that found in Chap. 26 of the Code of Civil Procedure of this state. Sec. 571 of such Code, being one of the sections of said Chap. 26, provides for an action by the State's Attorney, in the nature of quo warranto, to annul the charter of a corporation upon certain grounds among which is whenever such corporation shall "violate the provisions of any law, by which such corporation shall have forfeited its charter or articles of incorporation, by abuse of its power." Under such a section it will be found that the courts have frequently adjudged forfeiture of franchises, and that even in cases where the wrongful conduct of the corporation did not amount to a criminal offense. An illustrative case is that of The People of New York vs. North River Sugar Refining Co., which was tried at special term before Justice Barrett, who rendered an elaborate opinion therein. The defendant entered into a combination, which under the present law of this state would be a crime, but does not appear to have been criminal under the then statutes of New York. It was clearly a combination in restraint of trade. An action was brought to have declared forfeited the charter of such corporation, such action being brought under Sec. 1798 of the then Code of Civil Procedure of New York (said section being similar to our Code, above referred to), the state claiming under two provisions thereof, to-wit; first, because defendant had abused its powers; and second, because it had exercised privileges or franchises not conferred upon it by law. In passing, it is well to note that we have a statutory provision covering this second ground. The opinion at special term is found in 2 L. R. A. 33. The court found that the corporation had forfeited its charter, and among other things said:

"Mr. Morawetz states the rule with precision (2 Morawetz, Corp. § 1024): 'A corporation may incur a forfeiture of its franchises by the doing of an illegal act. Any act of a corporation which is forbidden by its charter, or by a general rule of law, and strictly every act which the charter does not expressly or impliedly authorize, is unlawful; and if the doing of such act is an injury to the public, it may be sufficient ground of forfeiture.'

The same rule is laid down in Kent, Taylor, Waterman, Lyd, Angell and Ames and Green's Brice. "Kent, 312; Taylor, §§ 289, 547, 459; "Waterman, § 427; Lyd, § 479 et seq.; An. & A. §§ 774, 775, 776; Green's Brice, 708, 709, 3rd. ed. 787.

Waterman says that 'The state is not required to prove an actual injury; it is sufficient cause of forfeiture if the act be such as in the nature of things is calculated to produce injury.' The cases all hold the same doctrine, laying down the general rule that the corporate privileges shall not be abused; that the corporation undertakes and agrees, upon condition of forfeiture, that it will so man-

age and conduct its affairs that it shall not become dangerous or hazardous to the safety of the State or community in and with which it transacts business (Ward v. Farwell, 97 Ill. 593); and that the franchise may be forfeited and the corporation dissolved for acts ultra vires, or for a breach of the trust condition and perversion of the objects of the grant. Chicago L. Ins. Co. vs. Needles, 113 U. S. 524 (28 L. ed. 1084); People v. Dispensary & H. Society, 7 Lans. 306; People v. Bristol & R. Turnpike Road Co. 27 Wend. 235; People v. Fishkill & B. Pl. Road Co. 27 Barb. 445; State v. Milwaukee, L. S. & W. R. Co. 45 Wis. 590; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. 4 Gill & J. 1, 106, 121.

58 These rules rest upon the inherent right of sovereignty. The franchises, whether resulting from general or special laws, are grants from the sovereignty of the people. Benefit to the country at large, form the objects for which the corporations are created, constitute the consideration, and in most cases the sole consideration, of the grant. Chief Justice Marshall in Dartmouth College v. Woodward, 17 U. S. 2 Wheat. 518, 637 (4 L. ed. 629).

It therefore follows logically that when those objects are perverted, when the country suffers injury instead of receiving benefit, the State, because of such misuser, may withdraw the privileges and resume its franchises."

This case came before the full supreme court of New York, wherein the decision was rendered by Justice Daniels and is found in 54 Hun. 354, which decision in all things affirms that at special term. It was then appealed, and in 121 N. Y. 582, 18 A. S. R. 843 is the opinion of the appellate court, affirming the decision of the supreme court, basing its affirmance solely upon the second ground set forth in the information, and in no manner passing upon the question of misuse. Several of the states, in passing laws against combinations in restraint of trade, have specifically provided that the State's Attorney or Attorney General should have power, and it should be his duty, to bring action for annulment of corporate franchises where the corporations are charged with doing the acts forbidden, thus putting those statutes exactly upon the same standing as the statute at bar; and the discussions found in the decisions

59 of these cases all show that the remedy thus provided for is purely civil in its nature, that it is not in the least in the way of a penalty or punishment for a crime, but merely that the courts may adjudicate whether or not the corporation has forfeited its right to exist. Distilling and Cattle Feeding Co. vs. People, 156 Ill. 448, 47 A. S. R. 200; State vs. Shippers etc. Co. (Texas) 69 S. W. 58; State vs. Schlitz Brewing Co. 104 Tenn. 117, 78 A. S. R. 941; New Orleans Water-Works Co. v. Louisiana, 185 U. S. 336; Waters-Pierce Oil Co. vs. Texas 177 U. S. 28; State vs. Standard Oil Co., 61 Neb. 28, 84 N. W. 413, 87 A. S. R. 449. We would call special attention to the case of State ex rel. Kohler, vs. Cincinnati, W. & B. R. Co. found in 7 L. R. A. 319, the act complained of not appearing to be a crime, but it being charged that there was a misuse of the franchise. The act complained of was the giving by a railroad company to one shipper of crude oil, a different rate than was

given to another, by the providing of a certain rate where oil was shipped in a tank-car, and a greatly different rate per gallon where oil was shipped in carload lots in barrels. We desire to quote briefly from this case as it bears directly upon a point hereinbefore discussed in this opinion, to-wit; that there is more than one way of creating a monopoly, that it is not essential that there be any combination between individuals or corporations. The court says: "The justification interposed is that this was not done pursuant to any confederacy with the favored shippers or with any purpose to inflict injury on their competitors, but in order that the Railroad Companies might secure freight that would otherwise have been lost to them. This we do not think sufficient. We are not unmindful of difficulties that stand in the way of prescribing a line of duty to a railway company, nor do we undertake to say they may not pursue their legitimate objects, and shape their policy to secure benefits to themselves, though it may press severely upon the 60 interests of others; but we do hold that they cannot be permitted to foster or create a monopoly, by giving to a favored shipper a discriminating rate of freight. As common carriers, their duty is to carry indifferently for all who may apply, and in the order in which the application is made and upon the same terms; and the assumption of a right to make discriminations in rates for freight, such as was claimed and exercised by the defendants in this case, on the ground that it thereby secured freight that it would otherwise lose, is a misuse of the rights and privileges conferred upon it by law."

We think therefore that it will readily be seen, and must be admitted, that provisions such as Sec. 2 of this act are constitutional, because if not, then our general statute providing for actions to declare forfeiture of franchises would be unconstitutional, in that it would have to be held that such statutes also adds a penalty for a crime committed by a corporation other than that provided in case the defendant is a natural person. It must be conceded that, if it is within the legislative power to enact such statutes separate and distinct from the criminal statutes, there can be no grounds for claiming that it is unconstitutional simply to combine them in the same statutes under separate sections, as has been done by so many of the states under their statutes regulating trusts and combinations. We might suggest that this ground of unconstitutionality now under discussion seems never to have been raised in any of the cases we have cited arising under these anti-trust statutes, from which we conclude that the fact that these provisions are constitutional is universally conceded. Such a provision is found in the statute under consideration in the case of State vs. Drayton, and in that case the question now before us was not raised.

Sections 1 and 3 of this act, if standing alone, would make a 61 complete penal statute; and if Sec. 2 had been omitted, there is no doubt but what the remedy provided for by section 2, could have been obtained under the general statute providing for actions to annul charters, at least against domestic corporations, and, if such general statute is not broad enough to provide for action

against foreign corporations, there can be no question but under the common law such action could have been brought, and this regardless of the fact that defendant had not been convicted under Sec. 3. How then can it be held that Sec. 2 is unconstitutional, when no one will claim the general statute not to be constitutional? It is therefore clear that the legislature had every power to declare the forfeiture and to direct the Attorney General to bring this class of actions. The legislature also would have the power to provide the method of procedure set forth in Sec. 2, for all cases under any of the grounds specified in the general statute above referred to; and if, therefore, for any reason, the legislature has seen fit to provide such procedure, applying it to cases where the corporations are charged with some particular misuse of their franchise rights, such corporations surely can not claim that such peculiar procedure, because applying only to that particular misuse, is for that reason unconstitutional, especially if as in case of the procedure provided for in Sec. 2, it is peculiarly applicable to the conditions confronting the investigation of such alleged misuse. It will be noted that the only power given to the Attorney General in investigating a complaint under such Sec. 2, is to subpeena witnesses, administer oaths, take testimony, and require a production of books or other documents. It does not specifically provide that he can require the accused to produce its books or documents or give testimony, and if such requirements, if contained in the statute, would be unconstitutional,

it would then be our duty to so construe the statute at bar
62 to limit this right to the production of other books and documents and the calling of other witnesses. But it is clearly within the power of the legislature to provide that a defendant may be required, under proper penalties, to produce its books and documents, for the reason, as hereinbefore stated, that this proceeding is purely civil in its nature. The appellant has cited the case of Phipps vs. Wisconsin Central Railway Co., 133 Wis. 153, contending that said case is an authority in support of its position,—that the provisions in Sec. 2 as to procedure are unconstitutional in that they apply only to corporations and not to persons or partnerships. A reading of said case will show that it has no bearing on the point involved herein, for the reasons that as the action provided for in Sec. 2 is an action against a corporation, and it would be impossible for there to be a proceeding for like purpose against a natural person, there is no infringement of any constitutional right providing such procedure. Consolidated Rendering Co. vs. State, 28 Supreme Court Reporter 178; Hammond Packing Co. vs. State of Arkansas, 29 Supreme Court Reporter 370. This last case was similar in a nature to an action to annul the charter of a corporation, it being brought under a statute providing for recovery, in a civil action, of a penalty for violation of an anti-trust act of the state of Arkansas. This act has most elaborate provisions in relation to matters of procedure, which provisions, as applied to corporations were as drastic as can be found in the statute of any state. We will not undertake to state the provisions of such statute nor to quote from such decision, but will say that to our mind, it covers fully the ques-

tions here raised by appellant, based upon the provisions in Sec. 2 relating to method of procedure. In closing this branch of 63 the case we refer again to the case of State vs. Standard Oil Co. *supra*, which involved the construction of an anti-trust statute. The first section of such statute defined a trust; the second prescribed a punishment therefor; the third declared a violation of the statute by a corporation to work a forfeiture of its charter and that it might be ousted by quo warranto; the fourth provided that all foreign corporations or persons not resident of the state violating the act, should forfeit their right of doing business within the state and that it should be the duty of the Attorney General and County Attorney to enforce such provision by injunction or by other proper proceedings. This act attacked as unconstitutional, and the court said: "In construing an act of the legislature all reasonable doubts must be resolved in favor of its constitutionality. If sections 3 and 4 provide penalties for crime, they violate the constitution and are absolutely void, for they deny the right of trial by jury (Const., art. 1, secs. 6, 11; State vs. Moores, 56 Neb. 1, 76 N. W. 530), and the right to a trial on an indictment or information: Const., art. 1, sec. 10. Furthermore, a corporation can violate the law only by transgressing section 2. That section declares the penal consequences of the transgression, and it would not be competent for the legislature to add another penalty and enforce each by a separate action: Const., art. 1, sec. 12. The true construction of sections 3 and 4 is that they are merely declaratory of the common law, and that they provide for ousting corporations by civil action, from the exercise or powers and privileges which have been abused. The action is no more criminal than is an action for damages resulting from the commission of a crime: *Waters-Pierce Oil Co. v. State*, 19 Tex. 64 Civ. App. 1, 44 S. W. 936. Section 4, so far as it relates to citizens of other states, is an unlawful discrimination in favor of the citizens of this state, and invalid in any view of the case. There is another reason why the motion should be sustained. Foreign corporations do business here not by right, but by comity: *Paul v. Virginia*, 8 Wall. 168; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521. The state grants them a privilege which it may revoke at pleasure. When they exercise their franchises in contravention of our laws, the privilege is revoked, and, that fact being ascertained, judgment may be rendered excluding them from the state. The revocation of the permission given a foreign corporation to do business here, is not the infliction of a penalty; it is not the deprivation of a right. The privilege is like any other license, and the withdrawal or cancellation of it in consequence of the commission of a crime is not punishment in a legal sense: *Martin v. State*, 23 Neb. 371, 36 N. W. 554; *Miles v. State*, 53 Neb. 315, 73 N. W. 678; *State v. Harris*, 50 Minn. 128, 52 N. W. 287, 531."

The views herein expressed in relation to the constitutional questions raised render it unnecessary for us to discuss the next point raised by appellant, to-wit:

"Whether the act can be severed and some parts saved, while others are condemned."

The last contention made by appellant is that:

"The act interferes with freedom of contract." Counsel for appellant frankly state that they avail themselves largely of the reasonings and authorities in the briefs filed in the Drayton case, and we would feel fully justified in resting our decision solely upon the reasoning of the court in the said case and upon what has been

hereinbefore stated, which tends to bear upon this question.

65 It will be seen by a study of this statute that it in no manner restrains the defendant from the making of any contract that is morally right and just. It does not even forbid the defendant from fixing prices for the express purpose of destroying competition, providing the defendant fails to discriminate between different points. When the permit was given to this corporation to do business within this state, the state did not surrender its lawful police authority and therefore the corporation took this right or franchise subject to the same restrictions imposed upon natural persons, and was thus required, and it impliedly agreed, to exercise its franchise in conformity with such police regulations as might at any time be lawfully adopted. In the case of State vs. Schlitz Brewing Co. supra, the court said: "In further refutation of the mistaken assumption that every citizen has an unrestricted right to acquire and dispose of property by such contract as he may choose to make, we quote from the Supreme Court of the United States as follows 'It would be idle and trite to say that no right is absolute. Sic uter tuo ut alienum non laedas is of universal and pervading obligation. It is a condition upon which all property is held. Its application to particular conditions must necessarily be within the reasonable discretion of the legislative power'. Orient Iron Ins. Co. v. Daggs, 172 U. S. 566."

Before closing we wish to add a few words to what we have already said in relation to the point, that the acts forbidden tend toward the creation of a monopoly, and that for the reason the statute comes within Sec. 20, Art. 17 of our constitution.

Human experience certainly teaches that men are usually controlled by some motive either laudable or otherwise in their business transactions with their fellow-men: and when the public, as in the case

66 at bar, sees any person or corporation establishing a radically different price at a point of competition, from that fixed at another point, it is the natural conclusion, based upon human experience, that such party has some ulterior motive—that he is not fixing such prices out of any feeling of kindness toward the people of such community, but that he expects eventually to obtain benefit therefrom; and it is therefore the conclusion of the public that it is the motive of such wrong-doer to drive the competitor out of business, and therefore recoup such loss as he may have suffered during said process of destruction by an increase in price after a monopoly has been acquired. As was well said by the Supreme Court in People vs. North River Sugar Refining Co. supra. "And after putting forth the efforts necessary to secure that end, it would not only be idle, but absurd, to indulge in the supposition that it was not intended to wield the authority, in this manner secured, for the pecuniary advantage of the associates. And the direct and

usual way in which that is accomplished, following out the common impulses of practical business men, is by the advancement of the prices of the commodities manufactured and sold, in the course of the business whose control may be in this way secured. When the opportunity to do that is provided, human selfishness is sure to turn it to a profitable account." Surely it cannot be successfully contended that the state has not the power to prevent the consummation of such wrongful motive, simply because, by so doing, it would impair the constitutional rights of any person, natural or artificial, to freely contract.

Summarizing all we have said herein:—the law makers of this state, taking notice of a business practice known to all men and which had grown in rapid strides during past years, until it was threatening the welfare and liberties of a free people by its tendency

67 to create monopolies in the articles of commerce, thus leaving the consumers the helpless prey to the avarice of the

holders of such monopolies, passed the law in question to cure the above mentioned evil; the law is sufficient in form as a criminal statute as it set out clearly the acts condemned as wrongful and forbid the same by providing a penalty for the doing of such acts; it is also sufficient in form as a civil statute designed to declare a forfeiture of corporation franchises and licenses in case of misuse of such franchises and licenses by the doing of the wrong condemned; it provides a method of procedure to have such forfeiture adjudicated, practical and consonant with the end in view; it brings under the purview of the criminal provisions every person, partnership and corporation in existence, and under the civil provisions, every corporation domestic and foreign, and is therefore, free from any attempt at classification of persons covered thereby; its civil provisions are in no sense a penalty for the crime, but a provision directing the proper tribunal to determine whether the corporation had broken its contract with the state, and they therefore do not impose a greater punishment upon corporations than upon natural persons; it in no manner interferes with full freedom of contract, except in so far as is proper and necessary to prevent wrong to the state and its subjects.

The order of the trial court sustaining the demurrer in the civil case is affirmed, as is the judgment of said court and order denying a new trial in the criminal case.

68 STATE OF SOUTH DAKOTA, *ss.*:

In the Supreme Court.

STATE OF SOUTH DAKOTA, Plaintiff and Respondent,
vs.

CENTRAL LUMBER COMPANY, Defendant and Appellant.

I, Frank Crane, Clerk of the Supreme Court in and for the State of South Dakota, do hereby certify that the foregoing pages numbered from one to thirty-eight, inclusive, contain a true and correct

copy of the Opinion in the above entitled cause, and of the whole thereof, as the same now remains of record in said Supreme Court.

In witness whereof I have hereunto set my hand and affixed the Seal of said Court, at Pierre, this 1st day of April, A. D. 1910.

[Seal Supreme Court, State of South Dakota.]

FRANK CRANE,
Clerk of the Supreme Court.
By E. B. ELMORE, *Deputy.*

69 In the Supreme Court, State of South Dakota, October Term, A. D. 1909.

File No. 2760.

STATE OF SOUTH DAKOTA, Plaintiff and Respondent,
vs.

CENTRAL LUMBER CO., Defendant and Appellant.

Present: Dick Haney, Presiding Judge; Dighton Corson, Chas. S. Whiting, E. G. Smith, and J. H. McCoy, Judges of said Court and the Officers thereof.

This action coming on to be heard at the April A. D. 1909 Term of this Court, at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the case and argued by counsel, and the Court having advised thereon and filed its decision in writing.

It is considered, ordered and adjudged, that the order sustaining the demurrer of the Circuit Court, within and for McPherson County, appealed from herein, be and the same is hereby affirmed.

And it is further ordered, that this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

And it is further ordered and adjudged, that —— have and recover of the —— costs and disbursements on this appeal, expended, taxed and allowed at ——.

By the Court.

[SEAL.]

DICK HANEY,
Presiding Judge.

Attest:

FRANK CRANE, *Clerk.*
By —— ——, *Deputy Clerk.*

70 In Supreme Court, State of South Dakota.

THE STATE OF SOUTH DAKOTA, Plaintiff and Respondent,
vs.
CENTRAL LUMBER CO., Defendant and Appellant.

Criminal Case.

Petition for Order.

To the Honorable Judges of said Court:

Yours petitioner, the defendant and appellant in the above entitled action, respectfully shows the court that the defendant intends to apply to the Supreme Court of the United States for a Writ of Error directed to this Honorable Court, asking for a review of the question involved in said case, relating to the alleged conflict of the statute therein construed, with the constitution of the United States, as specified in the record in said court;

And the defendant prays that an order be made directing the clerk of said Supreme Court not to return to the clerk of the Circuit Court of McPherson County, from which said appeal was taken, the files and records in said cause, but that they be retained in his office until the said defendant procures and serves his said Writ of Error, or until the expiration of the time allowed by the United States statutes for an appeal from the judgment and opinion of said court.

SEARS & POTTER,
Attorneys for Defendant and Appellant.

STATE OF SOUTH DAKOTA,

County of Day, ss:

71 H. H. Potter being duly sworn deposes and says that he is one of the attorneys for the appellant in the above entitled matter. That to his personal knowledge the defendant, Central Lumber Company expects and intends in good faith to prosecute an appeal from the judgment and decision of this Honorable Court, in said cause, to the Supreme Court of the United States, and desires that foregoing stay order be granted for said purpose.

H. H. POTTER

Subscribed and sworn to before me this 6th day of December, 1909.

FRANCES M. SEARS,
Notary Public, Day County, S. D.

[Seal Frances M. Sears, Notary Public, South Dakota.]

The clerk will retain the record in this case until otherwise ordered.

DICK HANEY,
Presiding Judge.

Dec. 9, 1909.

72 [Endorsed:] 2760. State of South Dakota in Supreme Court. State of S. Dakota, Plaintiff, vs. Central Lumber Co., Defendant. Petition for order to Clerk. Due personal service of within by receipt of true copy thereof is hereby admitted this — day of — A. D. 190—, at —, S. D. — — —, Attorney for —, Supreme Court, State of South Dakota. Filed Dec. 9, 1909. Frank Crane, Clerk. Sears & Potter, Webster, South Dakota, Attorneys for —.

73 In the Supreme Court of the State of South Dakota,

STATE OF SOUTH DAKOTA, Plaintiff & Defendant in Error,
vs.
CENTRAL LUMBER COMPANY, a Corporation, Defendant & Plaintiff in Error.

Order Allowing Writ of Error.

Comes now Central Lumber Company, the Defendant and Plaintiff in Error above named on this 2nd day of February, A. D. 1910 and files and presents to this Court its Assignment of Errors, together with its Petition, praying for the allowance of a Writ of Error intended to be urged by it and praying further that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States and that such other and further proceedings may be had in the premises as may be just and proper, and upon consideration of the said petition and Assignment of Errors, this Court desiring to give petitioner an opportunity to test in the Supreme Court of the United States the questions therein presented, it is by this Court

Ordered that a Writ of Error be allowed as prayed, provided, however, that said Central Lumber Company, Defendant and Plaintiff in Error herein, give bond in the sum of \$1000 to the State of South Dakota, to be approved by the Chief Justice of this Court, conditioned that said Central Lumber Company shall prosecute its Writ of Error to effect and if it fails to make good its plea shall answer all damages and costs that may be adjudged, which said bond when so approved shall operate as a supersedeas bond.

And it is further ordered that upon the serving of said Writ of Error by lodging a copy thereof for the adverse party, the State of South Dakota, in the Clerk's Office of this said Supreme Court for the State of South Dakota, where the record remains and upon the giving and approval of said bond, the said Writ of Error shall operate as a supersedeas and all further proceedings herein be suspended and stayed until the final determination of said Writ of Error by the United States Supreme Court, and that in the meantime and until the further order of this Court and until the final determination of said Writ of Error by the United States Supreme Court, the record and papers in this case remain in this Court.

In testimony whereof, witness my hand and the seal of this Court this 2nd day of February, Nineteen hundred and Ten.

CHAS. S. WHITING,
*Presiding Judge of the Supreme Court of
the State of South Dakota.*

[Seal Supreme Court, State of South Dakota.]

Attest:

FRANK CRANE,
Clerk of the Supreme Court of the State of South Dakota.
By E. B. ELMORE, *Deputy Clerk.*

75 [Endorsed:] No. 2760. State of South Dakota, Plff and Def't in Error, vs. Central Lumber Company, Def't and Plff in Error. Order Allowing Writ of Error and Supersedeas. Supreme Court, State of South Dakota. Filed Feb. 2, 1910. Frank Crane, Clerk.

76 In the Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, Plaintiff & Defendant in Error,
vs.
CENTRAL LUMBER COMPANY, a Corporation, Defendant & Plaintiff
in Error.

Assignment of Errors.

Comes now the Plaintiff in Error in the above entitled cause, Central Lumber Company, and files herewith its petition for a writ of error and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of South Dakota erred to the grievous injury and wrong of the Plaintiff in Error herein and to the prejudice and against the rights of the Plaintiff in Error in the following particulars:

First. The Supreme Court of the State of South Dakota erred in adjudging and holding that chapter 131 of the laws of the State of South Dakota for the year 1907, approved March 5th, 1907, entitled "An Act to define and prohibit Unfair Competition and Discrimination and to define the Powers and Duties of the Attorney General in regard thereto" was not violative of the Fourteenth Amendment to the Constitution of the United States.

Second. The said Supreme Court of the State of South Dakota erred in adjudging and holding that said chapter 131 of the 77 laws of the State of South Dakota for the year 1907, approved March 5th, 1907, entitled "An Act to define and prohibit Unfair Competition and Discrimination and to define the Powers and Duties of the Attorney General in regard thereto", did not deny to Plaintiff in Error, a person within the jurisdiction of the State of South Dakota, of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Third. The said Supreme Court of the State of South Dakota erred in adjudging and holding that said Chapter 131 of the laws of the State of South Dakota for the year 1907, approved March 5th, 1907, entitled "An Act to define and prohibit Unfair Competition and Discrimination and to define the Powers and Duties of the Attorney General in regard thereto", did not deprive the said Plaintiff in Error herein of its liberty and fundamental right of contract, without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Fourth. The said Supreme Court of the State of South Dakota erred in adjudging and holding that said chapter 131 of the laws of the State of South Dakota for the year 1907, approved March 5th, 1907, entitled "An act to define and prohibit Unfair Competition and Discrimination and to define the Powers and Duties of the Attorney General in regard thereto", did not deprive the Plaintiff in Error herein of its property without due process of law in violation of the said Fourteenth Amendment to the Constitution of the United States.

Fifth. The said Supreme Court of the State of South Dakota erred in adjudging and holding that said chapter 131 of the laws of the State of South Dakota for the year 1907, approved March 5th, 1907, entitled "An Act to define and prohibit Unfair Competition and Discrimination and to define the Powers and Duties of the Attorney General in regard thereto," did not, by reason of an arbitrary and unreasonable classification of persons, subject by its terms to its provisions, deny to the Plaintiff in Error herein equality under the law in violation of the said Fourteenth Amendment to the Constitution of the United States.

Sixth. The said Supreme Court of the State of South Dakota erred in adjudging and holding that said chapter 131 of the laws of the State of South Dakota is a valid and legal exercise of the police power of the State of South Dakota.

Seventh. The said Supreme Court of the State of South Dakota erred in affirming and not reversing the judgment of the Trial Court in the above entitled case, adjudging that the Plaintiff in Error herein, Central Lumber Company, pay a fine of \$200.00 and the costs of prosecution, amounting in the aggregate to \$262.90, and in affirming and not reversing the order of the said Trial Court, denying to the said Plaintiff in Error herein a new trial, for the reason that said judgment and order of said Trial Court were made solely under and by virtue of the provisions of said chapter 131 of the laws of the State of South Dakota for the year 1907, approved March 5th, 1907, entitled "An Act to define and prohibit Unfair Competition and Discrimination and to define the Powers and Duties of the Attorney General in regard thereto," and the effect of the same is to deny to the Plaintiff in Error, a person within the jurisdiction of the State of South Dakota, of the equal protection of the laws and to deprive it of its liberty and fundamental right of contract, without due process of law and to deprive it of its property without due process of law and deny to it equality under the law in violation of the said Fourteenth Amendment to the Constitution of the United States.

Wherefore, for these and other manifest errors appearing in the record, said Central Lumber Company, Plaintiff in Error, prays that the said judgment of said Supreme Court of the State of South Dakota, dated December 1st, 1909, be reversed, and that it have judgment for its costs.

L. L. BROWN,

Attorney for Central Lumber Company, Plaintiff in Error.

80 [Endorsed:] No. 2760. State of South Dakota, Plff and
Def't in Error, vs. Central Lumber Company, Def't and
Plff in Error. Assignment of Errors. Supreme Court, State of
South Dakota. Filed Feb. 2, 1910. Frank Crane, Clerk.

81 THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the
Judges of the Supreme Court of the State of South Dakota,
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of South Dakota, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between State of South Dakota, Plaintiff and Defendant in Error and Central Lumber Company, a corporation, Defendant and plaintiff in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Central Lumber Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and

82 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the

United States, together with this writ, so that you have the same at Washington on the 8th day of April, A. D. 1910, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 4th day of February, in the year of our Lord One Thousand Nine Hundred and Ten.

[Seal Circuit Court of the United States, District of South Dakota, Sioux Falls.]

OLIVER S. PENDAR,
Clerk of the Circuit Court of the United States, District of South Dakota,
 By ODIN R. DAVIS, Deputy.

[Endorsed:] 2760. Supreme Court, State of South Dakota. Filed Feb. 7, 1910. Frank Crane, clerk.

83

*Citation.*UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the State of South Dakota,
 Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within sixty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of South Dakota, wherein Central Lumber Company, a corporation, is Plaintiff in Error and you, are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in said Writ of Error mentioned, shall not be corrected and why speedy justice shall not be done the parties in that behalf.

Witness: the Presiding Judge of the Supreme Court of the State of South Dakota this 7th day of Feb'y, A. D. 1910.

CHAS. S. WHITING,
*Presiding Judge of the Supreme Court
 of the State of South Dakota.*

Attest:

FRANK CRANE,

*Clerk of the Supreme Court of the State of
 South Dakota.*

By E. B. ELMORE, *Deputy Clerk.*

Due and personal service of the within citation by copy is hereby admitted this 12 day of February, 1910.

Attest:

LLOYD H. STERLING,

*Assistant Attorney General of the State of
 South Dakota, Attorney for Defendant in Error.*

84 [Endorsed:] No. 2760. State of South Dakota, Plff and Def't in Error, vs. Central Lumber Company, Def't and Plff in Error. Citation and Acceptance of Service. Supreme Court, State of South Dakota. Filed Feb. 7, 1910. Frank Crane, Clerk.

85 In the Supreme Court of the United States.

CENTRAL LUMBER COMPANY, a Corporation, Plaintiff in Error,
vs.
STATE OF SOUTH DAKOTA, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents, that we, Central Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of Minnesota, as principal, and Chas. L. Hyde of the County of Hughes and State of South Dakota, and Albert Wheelon of the County of Hughes and State of South Dakota, as sureties, are held and firmly bound unto the above named State of South Dakota in the sum of \$1,000 to be paid to it and for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our successors, heirs, executors and administrators jointly and severally, firmly by these presents.

Signed, sealed with our seals and dated the 29th day of January, in the year of our Lord 1910.

— — —
— — —

86 STATE OF SOUTH DAKOTA,
County of Hughes, ss:

On this 2nd day of February A. D. 1910, before me, a Notary Public, within and for said County, personally appeared Chas. L. Hyde and Albert Wheelon, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[SEAL.]

LOUIS A. MUNSON,
Notary Public.

My commission expires Sept. 22, 1911.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 29th day of January A. D. 1910, before me appeared E. Hudson and J. N. Goodridge, to me personally known to be and who, being each by me duly sworn did say, that they are respectively the vice-president and the Secretary of the Central Lumber Company, the corporation named in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and said E. Hudson and J. N. Goodridge acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.]

E. A. BRACKETT,
Notary Public, Hennepin County, Minn.

My commission expires April 10, 1915.

87 Whereas, the above named Central Lumber Company, Plaintiff in Error, seeks to prosecute its Writ of Error in the Supreme Court of the United States to reverse the judgment rendered on the first day of December, 1909, by the Supreme Court of the State of South Dakota in an action in which the State of South Dakota was Plaintiff and Defendant in Error and Central Lumber Company, the Plaintiff in Error above named was Defendant and Plaintiff in Error.

Now Therefore, the condition of this obligation is such that if the above named Plaintiff in Error shall prosecute its Writ of Error to effect and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect. In witness whereof the said principal has caused its corporate name and seal to be hereto affixed by its proper officers and said sureties have duly signed and sealed the same.

CENTRAL LUMBER COMPANY, [SEAL.]
By E. H. HUDSON, *President.*

J. N. GODARD, *Secretary.*
CHAS. L. HYDE,
ALBERT WHEELON.

[SEAL.]
[SEAL.]

STATE OF SOUTH DAKOTA,
County of Hughes, ss:

Chas. L. Hyde and Albert Wheelon whose names are subscribed as sureties to the above bond, being severally and jointly sworn, each for himself says that he is a resident and freeholder of the State of South Dakota and is worth more than the sum in such bond specified as the penalty thereof over and above all his just debts and liabilities in property in the State of South Dakota not by ss law exempt from execution in said State.

CHAS. L. HYDE.
ALBERT WHEELON.

Subscribed and sworn to before me, this 2d day of February, A. D. 1910.

[SEAL.]

LOUIS A. MUNSON,
Notary Public.

My commission expires Sept. 22, 1911.

This bond approved this 2d day of February, A. D. 1910.

CHAS. S. WHITING,
*Presiding Judge of the Supreme Court of
the State of South Dakota.*

89 STATE OF SOUTH DAKOTA,
In Supreme Court, ss:

STATE OF SOUTH DAKOTA, Plaintiff and Respondent,
 vs.
 CENTRAL LUMBER CO., Defendant and Appellant.

I, Frank Crane, Clerk of the Supreme Court in and for the State of South Dakota, do hereby certify that the foregoing pages contains a true and correct copy of the Record and Judgment in the above entitled cause, and of the whole thereof, as the same now remains of record in said Supreme Court.

In witness whereof I have hereunto set my hand and affixed the Seal of said Court, at Pierre, this 1st day of April, A. D. 1910.

[Seal Supreme Court, State of South Dakota. Justice.]

FRANK CRANE,
Clerk of the Supreme Court,
 By E. B. ELMORE, Deputy.

90 Supreme Court of the United States, October Term, 1909.

No. 932.

CENTRAL LUMBER COMPANY, Plaintiff in Error,
 vs.
 THE STATE OF SOUTH DAKOTA.

It is hereby stipulated that the following parts of the record herein are deemed necessary for the consideration of this cause by the Court, and that the same may be printed for that purpose, to-wit:

1. Petition for Writ of Error.
 2. Order allowing Writ of Error.
 3. Writ of Error.
 4. The Citation and Proof of service thereof.
 5. Bond on Writ of Error.
 6. Assignments of Error.
 7. Transcript from the Circuit Court of McPherson County, South Dakota, showing all proceedings in that court contained in Appellant's abstract in the Supreme Court of South Dakota, viz:

(a) The Information.
 (2) The Demurrer.
 (c) Order Overruling Demurrer.
 (d) All Proceedings in said Circuit Court contained in the Bill of Exceptions settled and allowed by Lyman T. Boucher, Circuit Judge.
 (e) Exceptions allowed by said Circuit Judge.
 (f) Appeal to Supreme Court of South Dakota and assignment of error therein.

91 8. Opinion of the Supreme Court of South Dakota.
 9. Docket entries of Supreme Court of South Dakota of argument, submission, etc. of case in that Court.

10. Final Judgment of Supreme Court of South Dakota.
11. Stipulation to effect that final judgment was entered in Supreme Court of South Dakota on December 1st, 1909.

Dated June 1, 1910.

S. W. CLARK,
Attorney General of South Dakota.
L. L. BROWN,
Attorney for Plaintiff in Error.

92 [Endorsed:] Filed No. 22158. Supreme Court U. S., October Term, 1910. Term No. 544. Central Lumber Company, Plaintiff in Error, vs. State of South Dakota. Stipulation as to parts of record to be printed. Filed June 24, 1910.

Endorsed on cover: File No. 22,158. South Dakota Supreme Court. Term No. 276. Central Lumber Company, plaintiff in error, vs. State of South Dakota. Filed May 11, 1910. File No. 22,158.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 255

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Supreme Court
Filing

MAR 3 19

CENTRAL LUMINE COMPANY (a corporation) JAMES H. MCKEE
Plaintiff in Error.

vs.

STATE OF SOUTH DAKOTA,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
SOUTH DAKOTA.

Brief for Plaintiff in Error.

L. L. BROWN,

Winona, Minn.,

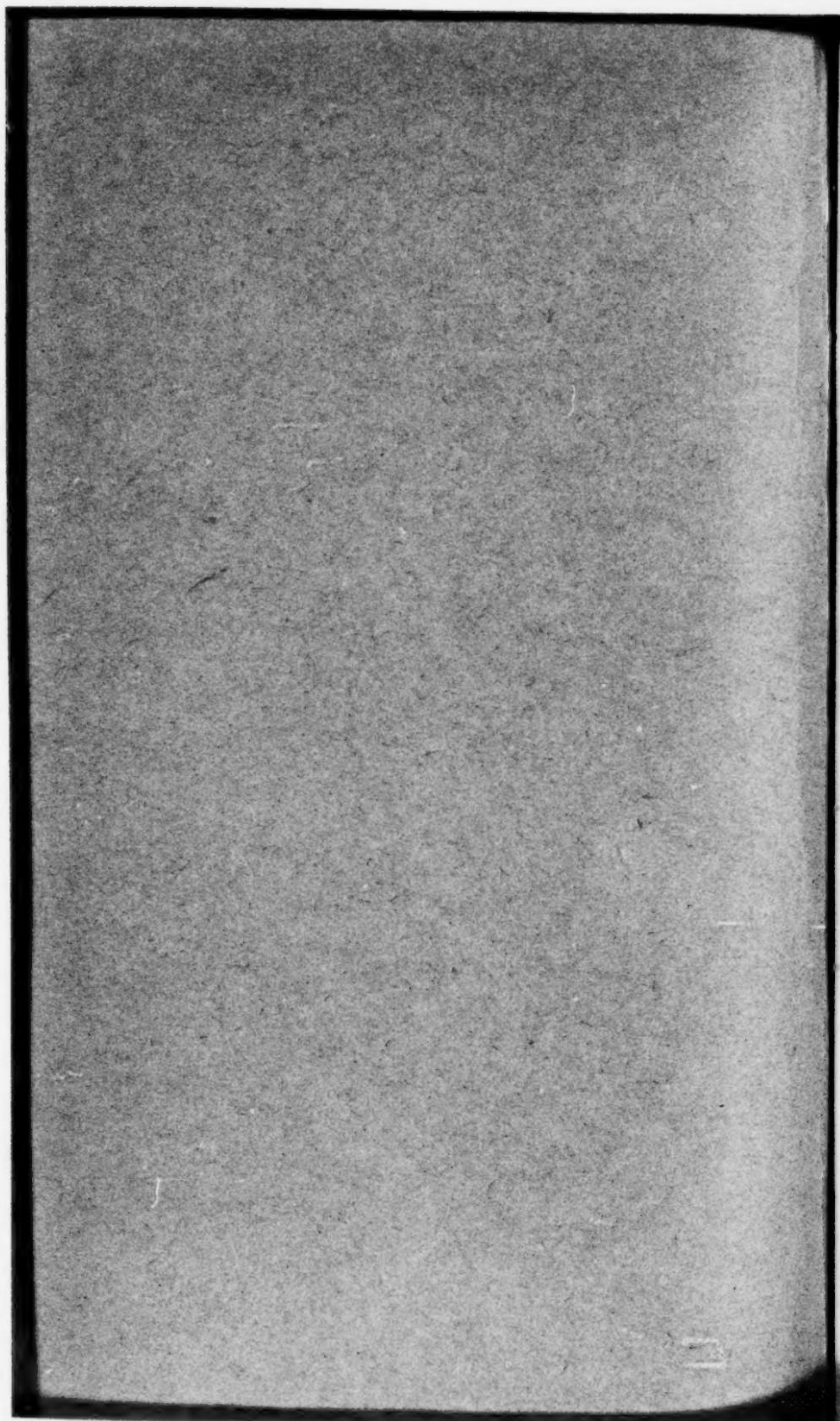
WM. A. LANCASTER

and

MILTON D. PURDY,

Minneapolis, Minn.,

Attorneys for Plaintiff in Error.



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Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 276.

CENTRAL LUMBER COMPANY (a corporation),

Plaintiff in Error,

vs.

STATE OF SOUTH DAKOTA,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
SOUTH DAKOTA.

Brief for Plaintiff in Error.

STATEMENT OF FACTS.

This case comes to this Court, upon writ of error to the Supreme Court of the State of South Dakota, to review a judgment of that Court, which affirmed a judgment of the Circuit Court of McPherson County of that State, adjudging the Plaintiff in Error herein to be guilty of the crime of "unfair discrimination" and that it pay a fine and the costs of prosecution. (For judgment, see Transcript of Record, page 15).

The case was prosecuted under the provisions of Chapter 131 of the Session Laws of the State of South Dakota for the year 1907, which reads as follows:

CHAPTER 131.

“AN ACT to define and prohibit Unfair Competition and Discrimination, and to Define the Powers and Duties of the Attorney General in Regard Thereto.

Be it enacted by the Legislature of the State of South Dakota:

1. *Unlawful Discrimination.* Any person, firm or corporation, foreign or domestic, doing business in the State of South Dakota, and engaged in the production, manufacture or distribution of any commodity in general use, that intentionally, for the purpose of destroying the competition of any regular established dealer in such commodity, or to prevent the competition of any person who, in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities or Cities of this State by selling such commodity at a lower rate in one section, community or City, or any portion thereof, than such person, firm, or corporation, foreign or domestic, charges for such commodity in another section, community or City, after equalizing the distance from the point of production, manufacture or distribution and freight rates therefrom, shall be deemed guilty of unfair discrimination.

2. *Duty of Attorney General.* If complaint shall be made to the Attorney General that any corporation is guilty of unfair discrimination as defined by this act, he shall investigate such complaint and for that purpose he may subpoena witnesses, administer oaths, take testimony and require the production of books or other docu-

ments, and, if in his opinion sufficient grounds exist therefor, he may prosecute an action in the name of the State in the proper Court to annul the charter or revoke the permit of such corporation, as the case may be, and to permanently enjoin such corporation from doing business in this State, and if in such action the Court shall find that such corporation is guilty of unfair discrimination as defined by this act, such Court shall annul the charter or revoke the permit of such corporation, and may permanently enjoin it from transacting business in this State.

3. Violation—Penalty. Any person, firm or corporation violating the provisions of section one (1) of this Act, shall, upon conviction thereof be fined not less than two hundred dollars nor more than ten thousand dollars for each offense.

4. Remedies Cumulative. Nothing in this Act shall be construed as repealing any other act or part of an Act, but the remedies herein provided shall be cumulative to all other remedies provided by law.

Approved March 5, 1907."

The case was instituted by the filing of an information by the State's Attorney of McPherson County (Transcript of Record, page 1) in the Circuit Court of the Sixth Judicial District of the State of South Dakota, in and for McPherson County, which information charged as follows:

"That the Central Lumber Company, a corporation, as hereinafter defined, on or about the 22nd day of September A. D. 1908, within the County of McPherson, and State of South Dakota, *did commit the crime of unfair discrimination*, as follows: That heretofore and on or about the 22nd day of September, A. D. 1908, at the town of Leola, and in the County of McPherson, in the State of South Dakota, the Cen-

tral Lumber Company, being then and there a foreign corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, and theretofore and on or about January 26th, 1899, it having duly filed in the office of the Secretary of State a duly authenticated copy of its articles of incorporation and appointed a resident agent within the State, and caused to be duly recorded in the office of the Secretary of State and in the office of the Register of Deeds of the County wherein said agent resides a duly authenticated copy of the appointment of said agent, and by virtue thereof it then became and ever since has been and is now duly and legally authorized to do business in this State, and so doing business in this State, and being engaged in the sale and distribution of a commodity in general use, to-wit, *lumber and building material, in the town of Leola, McPherson County, South Dakota, and in the town of Ipswich, Edmunds County, South Dakota, and elsewhere, did wilfully, wrongfully, unlawfully and intentionally, and for the purpose of destroying competition of a regular established dealer in such commodity, then engaged in like business in the town of Leola, McPherson County, South Dakota, to-wit, the Mitchell Lumber Company, a corporation duly organized and existing under and by virtue of the laws of the State of South Dakota, discriminate between different sections and communities of the State of South Dakota, to-wit, the said town of Leola, McPherson County, South Dakota, and the town of Ipswich, Edmunds County, South Dakota, by selling such lumber and building material at a lower rate in the town of Leola, McPherson County, South Dakota, than was charged by the said Central Lumber Company for said lumber and building material in said town of Ipswich, Edmunds County, South Dakota, after equalizing the distance from the point of production,*

manufacture and distribution, and freight rates therefrom; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of South Dakota."

To this information the defendant interposed a demurrer (Transcript of Record, page 2), stating as grounds therefor, among other things, that Chapter 131 of the Laws of the State of South Dakota for the year 1907 was unconstitutional and void, in that it was violative of the Constitution of the United States and particularly of the Fourteenth Amendment thereto, in that it denied to the defendant within its jurisdiction, the equal protection of the laws, and deprived said defendant of its liberty and property and fundamental right of contract without due process of law. Said Circuit Court overruled the demurrer (Transcript of Record, page 4), and the defendant thereupon interposed its plea of not guilty to said information (Transcript of Record, page 4). Evidence was introduced tending to prove the allegations in said information: and a jury duly impaneled to try the case, returned a verdict of guilty against said defendant of the charge contained in said information (Transcript of Record, page 9). The defendant, Central Lumber Company, raised the same questions as to the constitutionality of the act under the Constitution of the United States, as set up in its said demurrer, by objection to the introduction of testimony (Transcript of Record, page 5) by requested instructions to the jury (Transcript of Record, page 7) and by a motion in arrest of judgment

(Transcript of Record, page 9), and by a motion for a new trial (Transcript of Record, page 9), which said requested instructions were denied and the objections to evidence and motion in arrest of judgment and motion for new trial were overruled and judgment was thereupon entered by said Circuit Court against said defendant that it pay a fine and the costs of prosecution (Transcript of Record, pages 11 and 15).

The case was then taken by said defendant to the Supreme Court of the State of South Dakota, the Court of last resort in that State, upon writ of error to the said Circuit Court in and for McPherson County, said defendant assigning as error, among other things, the rulings of the said Circuit Court, overruling its said demurrer and overruling its said objections to the introduction of evidence and denying its requested instructions to the jury and overruling its said motion in arrest of judgment, and overruling its motion for a new trial (Transcript of Record, page 14).

Said Supreme Court of the State of South Dakota, on the first day of December, 1909, rendered final judgment in said case affirming the judgment of the said Circuit Court in and for McPherson County, and in an opinion filed on said date, held that said Chapter 131 of the Laws of the State of South Dakota for the year 1907, was valid under the Constitution of the United States and the Fourteenth Amendment thereto (Transcript of Record, pages 16 to 37).

From the final judgment of the Supreme Court of South Dakota, made and entered as aforesaid, Plaintiff in Error herein, the Central Lumber Company, brings the case on error to this Court and assigns the following errors in said judgment and decision of the said Supreme Court of the State of South Dakota.

ASSIGNMENT OF ERRORS.

FIRST: The Supreme Court of the State of South Dakota erred in adjudging and holding that Chapter 131 of the Laws of the State of South Dakota for the year 1907, approved March 5th, 1907, entitled "An Act to define and prohibit Unfair Competition and Discrimination and to define the Powers and Duties of the Attorney General in regard thereto" was not violative of the Fourteenth Amendment to the Constitution of the United States.

SECOND: The Supreme Court of the State of South Dakota erred in adjudging and holding that said Chapter 131 of the Laws of the State of South Dakota for the year 1907, approved March 5th, 1907, entitled "An Act to define and prohibit Unfair Competition and Discrimination and to define the Powers and Duties of the Attorney General in regard thereto" did not deny to Plaintiff in Error, a person within the jurisdiction of the State of South Dakota, the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

THIRD: The Supreme Court of the State of South Dakota erred in adjudging and holding that said Chapter 131 of the Laws of the State of South Dakota for the year 1907, approved March 5th, 1907, entitled "An Act to define and prohibit Unfair Competition and Discrimination and to define the Powers and Duties of the Attorney General in regard thereto", did not deprive the said Plaintiff in Error herein of its liberty and fundamental right of contract, without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

FOURTH: The Supreme Court of the State of South Dakota erred in adjudging and holding that said Chapter 131 of the Laws of the State of South Dakota for the year 1907, approved March 5th, 1907, entitled "An Act to define and prohibit Unfair Competition and Discrimination and to Define the Powers and Duties of the Attorney General in regard thereto", did not deprive the Plaintiff in Error herein of its property without due process of law in violation of the said Fourteenth Amendment to the Constitution of the United States.

FIFTH: The Supreme Court of the State of South Dakota erred in adjudging and holding that said Chapter 131 of the Laws of the State of South Dakota for the year 1907, approved March 5th, 1907, entitled "An Act to define and prohibit Unfair Competition and Discrimination and to Define the Powers and Duties of the Attorney General in regard

thereto", did not, by reason of an arbitrary and unreasonable classification or persons, subject by its terms to its provisions, deny to the Plaintiff in Error herein, equality under the law in violation of the said Fourteenth Amendment to the Constitution of the United States.

SIXTH: The Supreme Court of the State of South Dakota erred in adjudging and holding that said Chapter 131 of the Laws of the State of South Dakota is a valid and legal exercise of the police powers of the State of South Dakota.

SEVENTH: The said Supreme Court of the State of South Dakota erred in affirming and not reversing the judgment of the Trial Court in the above entitled case, adjudging that the Plaintiff in Error herein, Central Lumber Company, pay a fine of Two Hundred Dollars (\$200.00) and the costs of prosecution, amounting in the aggregate to Two Hundred Sixty-two Dollars and Ninety Cents (\$262.90) and in affirming and not reversing the order of the said Trial Court, denying to the said Plaintiff in Error herein a new trial, for the reason that said judgment and order of said Trial Court were made solely under and by virtue of the provisions of said Chapter 131 of the Laws of the State of South Dakota for the year 1907, approved March 5th, 1907, entitled "An Act to define and prohibit Unfair Competition and Discrimination and to define the Powers and Duties of the Attorney General in regard thereto", and the effect of the same is to deny to the Plaintiff in Error,

a person within the jurisdiction of the State of South Dakota, the equal protection of the laws and to deprive it of its liberty and fundamental right of contract, without due process of law and to deprive it of its property without due process of law and deny to it equality under the law in violation of the said Fourteenth Amendment to the Constitution of the United States.

The sole question to be determined by this Court is whether Chapter 131 of the Session Laws of the State of South Dakota for the year 1907 violates the provisions of the United States Constitution, and particularly the Fourteenth Amendment thereto.

BRIEF OF ARGUMENT.

The Statute of which complaint is made, was approved by the Legislature of South Dakota March fifth, 1907. A Statute very similar in its provisions to the one in question was passed by the Legislature of Nebraska on April third, 1907.

The language of Section one of the Nebraska Act is as follows:

“Section 1. (Local Unfair Disceriminations). Any person, firm, company, associaition or corporation, foreign or domestic, doing business in the State of Nebraska, and engaged in the production, manufacture or distribution of any commodity in general use, that shall intentionally, *for the purpose of destroying the business of a competitor in any locality*, discriminate between different sections, communities or Cities of this State, by selling such commodity at a

lower rate in one section, community or city, than is charged for said commodity by said party in another section, community or city, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of production, if a raw product, or from a point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful."

It will be noticed that Section 1 of the Nebraska Act differs from Section 1 of the South Dakota Act in this that, instead of the words "for the purpose of destroying the competition of any regular established dealer in such commodity" etc., it contains these words "for the purpose of destroying the business of a competitor in any locality".

Without stopping to inquire or discuss whether or not any distinction may be drawn between the words "destroying the business" and "destroying the competition", etc., it will be noticed that there is a marked distinction between the two Acts, in this respect, to-wit, the South Dakota Act provides that any person, etc., engaged in the production, manufacture or distribution of any commodity in general use "that intentionally, for the purpose of destroying the competition of any *regular established dealer* in such commodity", etc., while the Nebraska Act contains these words "that intentionally, for the purpose of destroying the business of a competitor in any locality", etc.; in other words, the South Dakota Act is evidently drawn in favor of the so called "regular established dealer" while the Nebraska Act is gen-

eral in this respect, and is in favor of a "*competitor in any locality*", or, in other words, *any competitor*.

This distinction between the two Acts is, we think, important upon the question of classification which we shall discuss later on.

The case of *State vs. Drayton*, 82 Neb., 254; 117 N. W. Rep. page 768, was a case involving the constitutionality of the Nebraska Act above quoted, and the decision in that case was rendered on September 16th, 1908, or more than one year prior to the decision of the Supreme Court of South Dakota in this case.

The opinion in the case of *State vs. Drayton*, also appears in 23 L. R. A. (N. S.), page 1287. In a note appended to the report of the decision in the latter volume, it is said:

"An extended search has failed to disclose any other case which has passed on the power of the Legislature to forbid selling a commodity in a particular locality at a lower rate than obtains elsewhere for the purpose of stifling competition."

The full decision of the Supreme Court of Nebraska in the *Drayton Case* is, for the convenience of the Court, appended to this brief and marked Exhibit "A".

The full decision of the Supreme Court of South Dakota in this case appears in the Transcript of Record, pages 16 to 37, both inclusive.

So far as we know, these two Statutes are the only ones of like import which have ever been passed by

the Legislatures of any of the States; and the decisions of the Supreme Court of Nebraska in the *Drayton Case* and of the Supreme Court of South Dakota in the present case, are the only ones which have ever been rendered directly passing upon the questions here involved.

The Plaintiff in Error is a foreign corporation, "duly and legally authorized to do business" in the State of South Dakota (see Transcript of Record, page 3) and consequently a "person within the meaning of the "equal protection" provision of the Fourteenth Amendment.

Southern Railway Co. vs. Greene, 216 U. S. R., page 400, and cases there cited.

We shall confine ourselves to the discussion of two questions which are necessarily involved in this writ of error:

First: This Act is *partial and discriminatory* legislation, and violates the "equal protection" clause of the Fourteenth Amendment, for two reasons:

(1) Because it attempts to make certain acts an offense when committed by one class of persons, and no offense when committed by other classes.

(2) Because it is not the exercise of the so-called police power for the benefit of the *public generally*, but only for the benefit of a *particular and limited* class, to-wit, the "*regular established dealer*."

Second: This Act *unduly and unreasonably* interferes with and restricts the liberty of, the citizen and his right to own, hold, sell and otherwise dispose of property within the State of South Dakota,

and his right generally to carry on and conduct one of the usual and ordinary occupations of life, to-wit, production, manufacture or distribution of any commodity in general use, and thus violates that clause of the Fourteenth Amendment to the Federal Constitution which reads as follows:

“Nor shall any State deprive any person of life, liberty or property without due process of law.”

For the purpose of this discussion, we deem it quite unnecessary to attempt any review of the authorities bearing upon the existence and the extent of the so-called police power. We concede, what has been so generally held, that the citizen holds his life, his liberty and his property subject to such exercise of the police power as may be reasonably necessary in order to preserve and protect the health, and safety, and to promote the general welfare of *the public*. It is, however, generally held that the police power is *subject* to the limitations of the Constitution, and not *superior* to them.

One of the generally recognized limitations upon the exercise of the so-called police power is that it must be general and not partial and discriminatory,—that while, for the purposes of legislation, there may be classification, such classification must always be reasonable, and have some reasonable basis upon which to stand. In other words, that where there are *different classes*, to some of which the law applies and not to others, the *difference* in the classes created must bear a reasonable relation to

the Act itself in respect to which the classification is made. The question of whether or not there is any true basis for classification, is one for the Courts.

A law may also be *partial* and *discriminatory* in that it only operates in favor of or to protect a particular class of the public and not other classes similarly situated.

Chicago, M. & St. P. Ry. Co. vs. Westby, 178 Fed. 619.

The Act in question is obnoxious to the "equal protection" clause for a double reason: *It is clearly designed and intended for the protection and benefit of a particular class, to-wit, the "regular established dealer"*, and also because it is designed and intended to affect or reach a *particular class*, to-wit, those dealers having *two or more places of business*, or selling goods in two or more communities in the State of South Dakota.

Not only is this the fair and necessary construction of the Statute, but it is the express language of the *information*, upon which the judgment is founded.

This language, with reference to the Plaintiff in Error, is as follows:

"and so doing business in this State and being engaged in the sale and distribution of a commodity in general use, to-wit, lumber and building material, in the town of Leola, McPherson County, South Dakota, and in the town of Ipswich, Edmunds County, South Dakota."

And with reference to the complainant, this is the language of the information:

"for the purpose of destroying the competition of a *regular established dealer* in such commodity, then engaged in like business in the town of Leola, to-wit, the Mitchell Lumber Company."

We say, therefore, that the Statute operates *in favor of a class*, to-wit, "*the regular established dealer*" and *against* a class, to-wit, the dealer having two or more places of business in the State.

It is axiomatic that it is just as incompetent for a State to grant or give unequal rights or privileges or exemptions to one *class* as it is to impose unequal burdens or liabilities upon another class.

See cases cited in *Chicago, Milwaukee & St. Paul Railway Co. vs. Westby*, 178 Fed., page 619 (C. C. A.)

We are met at the threshold of the case, with the emphatic assertion of the Supreme Court of South Dakota that there is no classification whatever in the Statute. On page twenty-five of the Transcript of Record, appears this language of the Supreme Court of South Dakota:

"It is the claim of appellant that the law in question violates Section 1, Article 14, of the Federal Constitution and Sections 2 and 18, Article 6, of the Constitution of this State; said sections of the State Constitution being in substance the counterpart of the provisions found in the Federal Constitution. Appellant has argued at great length and cited numerous authorities upon the question of what constitutes proper classification in criminal statutes, but under the view which we take of the statute now

before us, it is unnecessary to determine what the proper rules for such classification are and attempt to apply them to the provisions of this statute, *for the reason that it appears clear to us that there is absolutely no attempt at classification in this statute.*"

WHAT IS THE PURPOSE OF THE ACT?

The Attorney General of South Dakota sought to sustain the Act, not upon the ground that it was designed and intended to define and prohibit, as the title expressly declares, "unfair competition" and "unfair discrimination" (which necessarily would only be in favor of particular individuals or particular communities) but to reach and prohibit *monopolies* which affect, as it is claimed, the public generally. This claim on the part of the Attorney General seems to have been fully sustained by the Supreme Court of South Dakota, and it, therefore, becomes necessary to examine the Act and see whether or not the theory upon which the law is sustained, is found in the Act, either by express terms or by necessary implication.

It will be observed that the word "monopoly" is not used either in the title to the Act or in any of its provisions, nor yet any substitute for that term. The title to the Act is specific and is as follows:

"An Act to define and prohibit unfair competition and discrimination, and to define the powers and duties of the Attorney General in regard thereto."

The first Section is entitled, "Unlawful discrimination"; and it provides that any person who shall violate any of the provisions of Section one shall be deemed guilty of "*unfair discrimination*." By inference, perhaps, it may be said that Section 1 would seem to declare any person who is competing with any regular established dealer with the idea of securing his trade, and thus driving him from the field of competition, is unfairly competing or is guilty of unfair competition. While, if Section 1, properly construed, means anything with reference to discrimination, it is that discrimination between communities becomes unfair only when the party guilty of it, sells at one point in the State lower than he does at another point in the same State, for the purpose of competing with or destroying the competition of some "regular established dealer" at one of the points.

"Unfair competition" as used in the law, has a well defined meaning. So far as it is a legal term, it is used only with reference to some fraudulent methods used to deceive and mislead the public in respect to some article of trade or commerce which, by reason of some trademark, or distinctive trade name, has become known to the public as the particular property of a competitor.

It is, of course, clear that it is not used in any such sense in the Act in question. Section 1 of the Act necessarily involves a solecism so far as it relates to or attempts to define the two terms "unfair competition" and "unfair discrimination".

Discrimination between communities, with respect to the price of any article sold, may be conceived of without reference to *unfair competition* or any competition at all; and it is equally true that it is easy to conceive of unfair competition without reference to discrimination between communities. *In fact, the two terms are not in any way interdependent, but are separate and distinct, and, generally speaking, involve separate, distinct and independent acts*

So far as this Act is concerned, there cannot be any such thing as "unfair competition", no matter to what extent the competition may be carried, nor with what intent or effect, unless, in fact, the party guilty of it, *discriminates* between two or more communities by selling at *one* point for less than is charged for the same article at *another* point.

While the first Section declares the doing of the things prohibited to be "*unfair discrimination*", it might with equal propriety have declared the same to be "*unfair competition*." Section 1 would have been just as consistent in the one case as in the other. Furthermore, both terms "*unfair competition*" and "*unfair discrimination*" are in no way necessary to the Act, or to the definition of the offense which it is attempted to prohibit. Using the term "*unfair competition*" in the sense in which it is supposed the Legislature used it in the particular Act, there can be no "*unfair discrimination*" without "*unfair competition*", and, on the other hand, there can be no "*unfair competition*" without "*unfair discrimi-*

ation."

It has never been claimed by the Attorney General nor is it asserted by the Supreme Court of South Dakota, in the opinion filed in this case, that the Act was intended or designed to give to the people of one community the absolute right of buying any commodity in common use at as low a price as the same may be sold in another community; nor, on the other hand, is the Act intended or designed to protect the regular established dealer from *unfair competition generally*.

The only reasonable and logical meaning of the Act is that, it is designed and intended to protect a particular class, to-wit, a "regular established dealer" from the competition of another particular class, to-wit, *a dealer having two or more places of business in the same State*.

As an abstract proposition, we suppose it will hardly be questioned that it is just as incompetent for the Legislature of South Dakota to require a private dealer to sell his goods at point A, in the State of South Dakota, as cheaply as he sells the same kind of goods at point B, in the same State, as it would be to require a private dealer to sell his goods at point A as cheaply as *another* private dealer may sell the same kind of goods at point B.

It is clear, therefore, that the so-called "unfair discrimination" between communities, which is referred to in Section 1, is nothing more than a limitation placed upon the right of the particular dealer to sell his goods at a given price at a given point,—in

other words, the Legislature has simply hit upon the price at which a particular dealer may be selling the same goods at some other point in the State as the standard below which he will not be allowed to sell his goods at a given point in the same State where he is in competition with a "*regular established dealer*", with the intent of destroying the competition of the latter.

It would have been just as competent (and this we think is perfectly clear) for the Legislature to have prescribed a *different* standard of what may be termed a *fair price*. It might, with just as much propriety, have provided that a person should not sell his goods at one point where he is in competition with a "*regular established dealer*" at less than *ten per cent above the actual cost of the goods to him*, whenever he is endeavoring to secure the trade of such "*regular established dealer*" or trying to destroy the latter's competition.

POLICE POWER.

In the *Drayton Case*, the Supreme Court of Nebraska adopted, as its starting point, the following definition of police power taken from the 22nd American and English Encyclopedia of Law, page 915:

"The police power in its broadest acceptation, means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety and welfare of society, and establishing such rules and regulations for the conduct of all per-

sons and the use and management of all property, as may be conducive to the public interest."

Accepting this definition of the police power, it would seem to be extremely easy to sustain almost any conceivable law which a State might pass affecting a citizen's liberty of conduct, the control of his business, and the use and management of his property. In fact, that definition would seem to justify *all or nearly all* of the sumptuary laws which were passed by monarchical governments prior to the adoption of the Constitution of the United States.

The Supreme Court of Nebraska in the *Drayton Case*, as well as the Supreme Court of South Dakota in the present case, have laid down the rule that the policy of a law, and whether or not it is or may be conducive to the public interest, is a matter with which the Courts have nothing to do. The particular law may be wise or unwise; it is sufficient for the Courts to know that the Legislature in its wisdom has declared the law to be conducive to the public interest, and that declaration by the Legislature must, it is said, be regarded as conclusive.

If the idea of these two Courts, with reference to the extent of the police power, and the absolute power of the Legislature in any given case to declare the policy of the State, and what is for the public interest, is sound, a Constitution, either State or Federal, would seem to be a vain thing.

Under this broad, and, we may say, practically unlimited power, the State of South Dakota might con-

ceive it to be a good thing for that State (being largely an agricultural one) that no farmer should sow more than thirty per cent of his tillable land to wheat, or to any other grain; that no farmer should keep more than ten cows or two horses, or twelve hogs, etc.; that no trader should carry more than a particular class of goods; that no hardware dealer should carry a stock of groceries; that no drug store should carry paints and oils; that no machinery dealer should deal in live stock; that no lumber dealer should carry or deal in anything but lumber, and strictly building material; that no laborer within the State should be allowed to work more than six or eight hours per day; that the number of blacksmith shops should be regulated in every community, proportionate to the number of people in the community; that no laborer should demand or receive any wages above a maximum fixed by the Legislature; in fact, it is difficult, if not impossible, to put any limit on the power of the Legislature as defined by this quotation.

An even more exaggerated idea of the police power (and that it is superior to the Constitution itself) appears in the language of the Supreme Court of South Dakota in this case (see page 24 of Transcript of Record):

“In the above case, the Court quotes from the case of *Yick Wo v. Hopkins*, 118 U. S., 370, words which are as true as they are burning: The very idea that one man may be compelled to hold his life or the means of living, or any material rights essential to the enjoyment of life, at the

mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

If this quotation, in the connection in which it is used, has any significance in the mind of the Supreme Court of South Dakota, it is that a "regular established dealer" shall not be compelled to hold his means of living, or any material rights essential to his enjoyment of life, at the mere will of any other dealer, who may possess larger means, and have two or more places of business within the State, and that if he is so compelled to hold his life and his means of living and any of his material rights to such mere will, he is *essentially a slave and is without that freedom, which is the boast of the United States.*

The Court in the *Drayton Case* said, after making the above quotation:

"If the State has not the power to protect its people from the acts of those who have for their purpose the destruction of the business of a competitor, in order that the wrongdoer may have a monopoly, its powers are much more limited than we had supposed."

Of course, it is entirely possible that a Court may be right, though its reasons be wrong, but it is the usual and ordinary way of demonstrating that a Court is wrong, to show that its reasons are wrong, and that the authorities upon which it relies are, in fact, authorities for entirely opposite propositions.

The language from the *Yick Wo Case*, 118 United States, 370, was used, *not with reference to the police*

power of the State, but with reference to those *absolute* and *inalienable rights of the individual citizen*; and the fact that this language should be quoted with approval by the Supreme Court of Nebraska in the *Drayton Case*, and by the Supreme Court of South Dakota in the present case, as supporting the power of the respective States in the particular legislation complained of, shows a startling misconception of the real issue in these two cases.

The context of this quotation from the *Yick Wo Case* is such as hardly to permit of a misapplication of the doctrine there announced. Mr. Justice Matthews in delivering the opinion in that case, after dwelling upon certain *inalienable rights* which the citizen possesses, and which the States are powerless to interfere with, said:

“But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth ‘may be a government of laws and not of men’. *For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.*”

It is unnecessary further to refer to what was held in the *Yick Wo Case*. It is a matter with which every lawyer is familiar. It is sufficient to say that the language quoted with such apparent approval by both Courts, is pertinent to our contention, but has no relevancy whatever as establishing that full, complete and conclusive power in the State for which the Courts in the above opinions were contending. Mr. Justice Matthews used that language with respect to the rights of the citizen, which the States were powerless to encroach upon. The Supreme Courts of Nebraska and South Dakota quoted the language as supporting their contention for the almost unlimited power of the State Legislature.

CLASSIFICATION.

While the Courts have found it quite easy to formulate abstract propositions with reference to proper classifications by the Legislatures for the exercise of the police power, yet the decisions manifest considerable conflict in the application of the general propositions to particular cases.

It is well settled that, in order to warrant the exercise of the police power by the State, it must affirmatively appear that there is some general public welfare (using that term to include health, safety and public interest generally) to be promoted by the particular legislative act.

In the case of the exercise of the power of eminent domain, it is familiar that *private property* can only

be taken for a *public use*, and what constitutes a public use is always a question for the courts. So with reference to exercise of the police power. There must be present the *public welfare* to be promoted; otherwise there can be no reason for the exercise of the so-called police power. The term *public welfare* is used in contradistinction to merely *private advantage or benefit*. When a so-called police regulation is by its terms so manifestly in the interest of a small class, or of only a part of a class, then it is manifestly not in the interest of the public. It is, in effect, a *private and discriminatory* enactment, and consequently *class legislation*.

It is, we think, perfectly plain that it is just as incompetent for the Legislature by its mere declaration to make a purely *private interest or advantage* a *public welfare* as it would be for the Legislature to make some *private use* a *public use* for which private property might be taken by the exercise of the power of eminent domain. As before stated, this Act is in its express terms in favor of the "*regular established dealer*." We suppose there would be little trouble in defining, at least, in a general way, what would constitute a "*regular established dealer*."

In the case of a lumber yard, for instance, it would undoubtedly be construed to mean a dealer who carried a stock of lumber and building materials in some measure, at least, commensurate with the reasonable demands of the community in which the lumber yard was located, and that the lumber yard was kept open ready to respond to the demands of the

community for lumber and other building materials, and where purchases could be made, at least, during reasonable hours of every day, or nearly every day, in the week.

As a matter of common knowledge, large quantities of lumber and other building materials are sold and disposed of, especially in country towns and sparsely settled agricultural districts, from remote yards and oftentimes from yards located in other States. Much lumber is thus distributed in carload lots from manufacturing centers. There is present in most, if not all, communities a strong competition, especially in lumber, which is not the competition of any "regular established dealer." This competition is naturally discouraged by the retailer and encouraged by the consumer.

It is a matter of common knowledge that the so-called catalogue or mail order houses are now strong competitors for almost every conceivable commodity in common use, especially in agricultural districts throughout the West. This class of competition makes its bid for trade by appealing to the consumer direct on the basis of lower prices than are offered by the "regular established dealer". This appeal is based upon the lower cost of distribution and upon the elimination of the middle man. Whether the appeal is or is not strictly true, it, at least, presents a very persuasive argument to the consumer, and through this appeal the catalogue and mail order houses have built up, in the last decade, an extensive business. There is, therefore, present in almost every

community (especially in the Western States), not only the competition of the "regular established dealer" but that of the transient dealer, of the solicitor, and of the catalogue or mail order houses. With reference also to farm machinery, it is probably no exaggeration to say that a very large percentage of this class of trade is conducted through other mediums than those of the "regular established dealer."

As before stated, this law is, by its express terms, limited to a competition directed against the "regular established dealer" only. Suppose the Legislature, in its discretion, had seen fit to limit this law, not to the "regular established dealer", but to any dealer who should be a veteran of the Civil War, or who should have a wife and children to support, or who should have invested in his business a capital of not more than Four Thousand Dollars; or suppose the law had been confined to *women dealers* only. Would not the classification be so obviously partial, discriminatory and arbitrary as to render the legislation invalid?

May the Legislature say that competition of a "regular established dealer" may be encouraged, while that of a transient dealer or of a solicitor or traveling salesman, or of a catalogue or mail order house shall *not* be encouraged? May the Legislature promote and encourage the competition of one, and discourage that of the other, and can such promotion or discouragement be said to be in the *public interest*? Is it not obvious that the best regulator of competition is the demands of the trade itself? Is not

the general public interested in encouraging *all* competition rather than promoting a *certain* class and discouraging *other* classes?

Suppose, for instance, the State of South Dakota had undertaken to accomplish what it may have conceived to be for the interest of the public, by imposing taxes upon dealers,—a small tax upon the “regular established dealer”, and a much higher tax upon any dealer who had two or more places of business. In other words, suppose the Legislature had provided that any regular established dealer having only one place of business should pay a license tax of Ten Dollars, and that if he had two or more places of business, he should pay a license tax of One Thousand Dollars for each additional place of business. Would anyone undertake to sustain such a law? And yet very nearly the same argument could be used to sustain such a law as is used by the Supreme Court of South Dakota in the present case. It is clear that this law is designed to protect the so-called “regular established dealer”, and, at the same time, is directed against the competition of the dealer who may have two or more places of business in South Dakota. Any reasonable construction of the language of the Act leads to this conclusion, and it is a matter of common knowledge that this sort of legislation has been the result of an agitation on the part of the independent dealer against the so-called “line” dealer.

Suppose we take the case of buyers of agricultural products, rather than the sellers of commodities in

common use, and apply the same principles which are sought to be applied here in order to sustain the law, and see what the result would be. Take the case of "line" elevators which handle such a large percentage of the grains produced by the agricultural sections of the West. Suppose, for instance, the State of South Dakota should pass a law making it a criminal offense for any "line" elevator man to pay more for farm products at one point in the State than he pays for the same kind of products in any other point in the State, after equalizing the difference in freights. Such a law would manifestly be in the interest of the single independent grain buyer. Could it be well contended that such a law could be sustained upon the theory that it was in the public interest, when the only possible advantage to be derived from such an Act would obviously be to such *independent grain buyers*?

It is, we think, perfectly clear that the penal provisions of the Act can only affect such dealers as may be doing business in two or more sections, communities or Cities in the State of South Dakota. The language of the Act is, dealers who may be "engaged in the production, manufacture or distribution of any commodity in general use". This, of course, will include practically every dealer in lumber and building materials, such as lime, cement, plaster, paper, brick, etc., dealers in coal and fuel, dry goods, groceries, hardware, clothing, hats, caps, furnishing goods generally, drugs and drug sundries, paints, oils, boots and shoes, millinery, farm implements and machin-

ery of every kind and description.

It is certainly no exaggeration to say that by far the greater part of all these different commodities are furnished to the ultimate consumer by the ordinary dealer who has a store or lumber yard in not more than one place, section, community or City. Under the terms of the Act, in any given community where there are two or more competitors in the same line of trade, each competitor is at liberty to compete for all the trade in that locality without let or hindrance. He may by his competition drive out and destroy the competition of one or more of his competitors, *and the Act does not reach him.* He is at liberty to fix his prices at any figures he may see fit. He may, for the purpose of crushing his competitors, sell his goods below cost. He may have unlimited capital and his competitors may be men of small means. No matter what the nature of his competition may be, or to what extent he may carry it, he is not within the terms of this Act. The latter reaches only those who may be doing business in two or more sections, communities or Cities of the State of South Dakota. It is a matter of common knowledge that this will reach but a small percentage of the dealers in the commodities of general use. It will reach principally only the so-called "line" lumber yards. These companies usually have a line of yards located throughout a particular section of the State on some one or more lines of railroad, so situated that they may be conveniently handled, with special reference to shipping facilities, from some central point of dis-

tribution. These yards usually carry a stock of lumber and building material, and coal and wood, and are in competition with the independent dealers all over the State,—few communities of any considerable size being without two or more such yards.

These "line" yards, and also the independent yards, are in close competition with the catalogue or mail order houses, and in recent years, the latter have, perhaps, furnished the severest competition for both the "line" yards and the independent yards. On the face of the Act, therefore, it is clear that the "class" against which this Act is directed, is the "line" yard, or, at least, the dealer who has two or more places of business within the State. This Act should be construed, we think, precisely the same as it would be construed in case it had read something like this:

"Any person, firm, or corporation, foreign or domestic, doing business in the State of South Dakota, and engaged in the production, manufacture or distribution of any commodity in general use, that intentionally, for the purpose of destroying the competition of any regular established dealer in such community, or to prevent the competition of any person who, in good faith, intends and attempts to become such dealer, shall discriminate between different sections, communities, or Cities of this State, by selling such commodity at a lower rate in one section, community, or City, or any portion thereof, than such person, firm or corporation, foreign or domestic, charges for such commodity in another section, community or City, after equalizing the distance from the point of production, manufacture or distribution and freight rates therefrom, shall be deemed guilty of unfair discrimi-

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ination, *provided, however, that this Act shall not apply to any person, firm or corporation, foreign or domestic, that does not have and maintain two or more different places of business in different sections, communities, or Cities of this State.*"

It was the contention of the Attorney General, and it was squarely held by the Supreme Court of South Dakota, that there is in reality no question of classification involved in this case. Counsel for the State have contended that the Act is general, and applies to all and not to any class, and refers to the first part of the section in which all dealers in commodities of general use are included; and yet we apprehend that it makes no difference whether by the terms of the Act the classification is *formal* and *express*, or in defining the offense and prescribing the conditions under which the offense may be committed, *a particular class is necessarily created, to which only, the Act can apply*. To illustrate, we would say that a Statute which undertook to define and punish forgery would be obnoxious to the Constitution, however it might be expressed, if, in fact, the inevitable effect of the Statute would be to affect only a certain class.

Suppose, for instance, a Statute directed against forgery should read as follows: "Any person, except only left handed persons, who shall commit forgery, shall be punished in a certain way." This, by its very terms, would be partial and discriminatory. Suppose, on the other hand, the Statute should read as follows: "All persons, who shall commit forgery,

etc., by the use of their right hands, shall be guilty of a felony and punished as follows." Here, in effect, the Statute would be applied in practically the same way, and the result would be the same in either case, to-wit, *an improper classification*.

We think the same rule should be applied here. No dealer in a commodity in general use could possibly commit the offense denounced by this Statute, no matter what his competition might be, and no matter what his purpose might be, unless he sold in one community at a lower price than he sold in another community, section or City. If, as is the ordinary way of doing business, where a man only maintains one place of business, he confined his sales to one section, community or City, he could not possibly commit the offense prescribed by this Act. Consequently, we say that the Act applies only to a class, and it must be construed as though all other classes were excepted from the effect of the Statute, or as though the Act in the first part of Section 1 had read:

"Any person, firm or corporation, foreign or domestic, doing business in the State of South Dakota in two or more places, sections, communities, or Cities, etc."

The limitations on this power of classification will be best understood by an examination of some of the leading cases thereon. We call attention to the case of *Connolly vs. Union Sewer Pipe Co.*, 184 U. S. Reports, 540. The so-called "Trust Statute" of Illinois, of 1893, was involved in that decision. The Statute

is given in full on pages 552, 553 and 554 of the decision.

The language of the Statute was general and applied to all persons who should be guilty of certain acts set forth in Sections 1 to 8, inclusive. By Section 9, it was provided as follows:

"The provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

It was contended by those who sought to sustain the validity of the Act that this was a proper exception, and resulted in the Act applying to a proper class, to-wit, all dealers, excepting only the actual producers or raisers of agricultural products or live stock. In other words, it was contended that because experience had shown, at least, to the satisfaction of the Legislature, that the producers and raisers of agricultural products and live stock had not shown the intention or ability to combine in such a way as to affect the public, therefore it was competent for the Legislature to exclude them from the penalties of the Act.

It was said that it was a matter of common knowledge that the evil effect of combinations had only been manifested when such combinations were resorted to by others than producers and raisers of agricultural products and live stock and the argument was pressed to the limit in that case that the Legislature of a State was not bound to make an Act, which, in the exercise of the police power, it might see fit to enact, apply to any class or classes

which had not been to any appreciable extent engaged in the acts or conduct against which the Statute was intended to operate.

This Court, speaking through Mr. Justice Harlan, said:

"Looking specially at its provisions, it will be seen that, so far as the Statute is concerned, two or more agriculturalists or two or more live stock raisers may, in respect of their products or live stock in hand, combine their capital, skill or acts for the purpose of creating or carrying out restrictions in the sale of such products or live stock; or limiting, increasing or reducing their price; or preventing competition in their sale or purchase; or fixing a standard or figure whereby the price thereof to the public may be controlled; or making contracts whereby they would become bound not to sell or dispose of such agricultural products or live stock below a common standard figure or card or list price; or establishing the price of such products or stock in hand, so as to preclude free and unrestricted competition among themselves or others; or by agreeing to pool, combine or unite any interest they may have in connection with the sale or transportation of their products or live stock that the price might be affected. *All this, so far as the statute is concerned, may be done by agriculturalists or live stock raisers in Illinois without subjecting them to the fine imposed by the Statute.* But exactly the same things, if done by two or more persons, firms or corporations or associations of persons, who shall have combined their capital, skill or acts, in respect to their property, merchandise or commodities held for sale or exchange, is made by the Statute a public offense, and every principal, manager, director, agent, servant or employe knowingly carrying out the purposes, stipulations

and orders of such combination is punishable by a fine of not less than Two Thousand nor more than Five Thousand Dollars."

COMPETITION.

Where there are two dealers, in a particular community, in the same kind of commodities, each may be reasonably supposed to be competing for the same trade. This is called competition, and competition necessarily implies strife for a *common* object. To say that one dealer is seeking to destroy the competition of his competitor, is, in effect, saying no more than that he is seeking to secure the other's trade, and, as long as he seeks to secure *that trade by competition*, either in the quality of the goods sold, or the service furnished, or the prices named, any damage to the competitor which may result from that competition is necessarily *damnum absque injuria*.

This, we think, has been invariably the rule adopted by all the courts. It is the doctrine laid down in the case of *Passaic Print Works v. Ely & Walker Drygoods Co.*, by the Circuit Court of Appeals, Eighth Circuit, 105 Fed., page 163.

In the *Drayton case*, the Court said:

"The whole fabric of civilized, social and commercial life, and the enjoyment and ownership of liberty and property, is based upon compromises and limitations of the use of one's members and the control of his property. The act in question only provides against the use and sale of one's property for the purpose of de-

stroying the business of a competitor. *The owner or dealer may sell for any price he may choose, or on any terms he may adopt, without reference to what effect his action may have upon the trade or business of others so long as he does not do so for the purpose named.*"

Here, it will be noticed, the Court recognizes (what must be obvious to everyone) that the nature, and we may say inevitable effect, of competition carried to its logical conclusion, is to exclude from a particular field one of the competitors. It is, of course, a matter of common knowledge that this result does not *always* follow, and there may be many reasons for this. When, however, one trader in a particular locality cuts the price of a particular commodity below that for which his competitor is selling it, it is done for the purpose of securing the trade of that locality, at least, so far as that particular commodity is concerned, and following the usual laws of trade, the dealer so cutting the price will naturally secure the trade, provided, always, the competitor does not meet the price or make a better one.

To say, therefore, that a dealer is at perfect liberty to cut the price in respect to one or more or all of the commodities in which he is dealing, and may, as the Court in another part of its opinion in the *Drayton case* said, *so undersell his competitor as to draw away his trade, or even compel him to adopt his scale of prices or abandon his business*, and that such conduct is, even under the Nebraska Act, lawful, *provided, of course, he does not, in fact, intend that what he does shall compel his competitor to abandon his busi-*

ness, is an obvious absurdity. It is, in effect, saying that a man may be allowed to do certain things, the natural or inevitable effect of which may be to compel his competitor to abandon business, and that such action is not within the purview of the particular statute, *unless, in fact, the dealer intends what his act necessarily implies.*

There is an obvious contradiction in the statement of any such proposition. How can it be said that one who persistently undersells his competitor, and is thus constantly struggling or competing for his competitor's trade does not, in fact, intend that, if he can do so, he will secure the other's trade and thus compel him to abandon business? In other words, how, in any given instance, (at least in the absence of express admissions on the part of a dealer with respect to his actual intentions) would the intention specified in the statute be proved? *In practically all cases it could only be proven by the very acts of competition which, the Court says in one part of its opinion, the statute in no way interferes with.*

The Court, in the *Drayton case*, takes pains to say that these very acts of underselling are in no way interfered with by the statute, even though they may draw away the trade of a competitor, or even *compel him to abandon his business.* And yet, if, in fact, the dealer has the intent to do just what his acts necessarily imply, then he is guilty of the offense which the statute denounces.

This is evidently a mental merry-go-round. There is no offense, says the Court, unless there is the in-

tent; but if you prove the act, you may *infer* the intent,—because if you cut the price to get the trade, and, getting the trade, you compel the other dealer to quit business, you must be presumed to intend the inevitable effect of your act.

In the *Drayton case*, the Court said:

"It may be that by underselling others he may draw trade away from them, or, indeed, *the secondary effect may be to compel them to adopt his scale of prices or abandon their business*, yet, if his conduct is not for the purpose and with the intention prohibited by the statute, he is violating no law, and no one can legally object to or interfere with his methods. The statute clearly makes the purpose with which the act is done the controlling element of the offense."

It is an utter impossibility for any man to compete with his neighbor, without affecting the latter's trade. It is not competition unless it does affect his trade. It is true that the competitor may find ways and means of off-setting or counteracting such effect, but, if he does not, his trade is necessarily injured by this competition, and it would be practically a stultification for a dealer to cut prices or afford better service, give longer credit, or extend better terms on the sale of his commodities, than his competitor does with respect to the same things, and, at the same time, contend that he did not design or intend to *secure the trade of his competitor and thus injure him*.

The Court implies a distinction between the right of a dealer to secure all the trade, if he can, of a particular locality, and the right to *destroy* the business

or *destroy* the competition of another dealer. This, we think, is obviously unsound. Trade may be assumed to be the life of business, without which a dealer cannot long survive. To say that it is perfectly proper and legal for one dealer to secure all the trade in a particular locality as long as he secures the same by selling better goods at lower prices, or on better terms than his competitor, provided he does not, in fact, destroy the business of such competitor, involves a contradiction in terms.

But what do the words, "for the purpose of destroying the competition of a regular established dealer" mean? What does destroying the competition necessarily imply? Do these words in reality mean any more than competing with another? Both the Supreme Court of Nebraska and the Supreme Court of South Dakota seem to imply, at least, that these words are used as meaning a malicious injury; in fact, both Courts seem to treat the acts denounced by the statute as malicious injuries at common law. This, however, is clearly unsound, according to all the decisions.

Tuttle v. Buck, 107 Minn., 145,

Aikens v. State, 110 Wisconsin 189,

Aikens v. State, 195 U. S. Reports, 194.

Here the alleged offense is meeting competition,—seeking trade of another for the purpose of securing it for one's self, and *the methods adopted for securing it are the usual methods of competition*. There is of course, no question of combination or conspiracy

involved in this case. In some portions of their opinions, the courts of Nebraska and South Dakota declare in favor of *free* competition. They say that trade is open to all,—that securing trade is no offense, but, in effect, add that if you get the trade *with the intent to get it*, and thus destroy the competition of a “regular established dealer,” you are guilty of an offense.

But let us examine the language of the Court in the *Drayton case*, above quoted, and see if there is not an obvious confusion of ideas contained therein.

You may, says the Court, by *underselling* others, “*draw trade away from them*”; or you may, “*compel them to adopt*” your scale of prices; or *compel them even to “abandon their business”*, yet if your conduct “is not for the purpose and with the intention prohibited by the statute” you are “*violating no law*” and “*no one can legally object to or interfere with*” your methods.

What is prohibited by the terms of the statute? Why, obviously, the things which the Court says you may legally do—*compelling another, by underselling him, to abandon his business*, provided you intend what the Court concedes may be one of the natural, if not inevitable, results of your acts.

Coming back to the question of classification, we may observe that almost every argument advanced and urged in the *Connolly case, supra*, to sustain the so-called Trust Act of Illinois in excluding from its operation agriculturists, is set forth by the Supreme

Court of South Dakota in the case at bar. No attempt is made by that Court to distinguish the present case from the *Connolly case*. In fact, the argument based upon improper classification is disposed of by the Supreme Court of South Dakota in a very peremptory manner.

That Court for the second time said:

"A complete answer to this contention (with reference to classification) is that the persons above specified are without the law, not because they are left out by any classification created by such law, but rather because in each of said cases, there would be lacking one of the elements going to make up the particular criminal act created by this statute, to-wit, discrimination between two points.

As we have said, there is no attempt at classification by this act. The only classification claimed by appellant is a classification as to persons; yet this law applies to every existing person, partnership or corporation without regard to wealth, age, situation, color, or any other methods of distinction. In the determination of whether a crime has been committed, there are always these two things at least to be considered: *First, the persons committing the offense, and, second, the acts constituting the offense.* As to the first, there may be such a classification by the statute, as will render such statute unconstitutional, but not so as regards any restriction or limitations as to the acts constituting the offense."

This, we submit, is a verbal distinction without any real difference, and is effectually met and completely answered by the facts and the decisions of this Court in the *Connolly case, supra*. There the classification

referred to was not in form with respect to persons; in fact, the language of the statute does not make, in form, at least, any classification at all any more than there is a formal classification in the South Dakota Act.

Section 1 of the Illinois Act defines a "trust", and defines it with reference to the things done by two or more persons, firms, corporations, or associations.

Section 9 of the Act, on account of which this Court held the entire Act to be unconstitutional, does not, in terms, exclude persons, but excludes from the operation of the Act certain products, to-wit, *agricultural products or live stock, before the same shall have been parted with by the producer or raiser.* In other words, the Act undertakes to define what a "trust" is, and it defines it by saying that it shall consist of two or more persons, firms, corporations, or associations, doing certain things with reference to all merchandise or commodities, excepting agricultural products and live stock while in the hands of the producer or raiser.

There is no direct classification of persons in the Illinois Act any more than there is in the South Dakota Act, and yet, excluding those products from the operation of the Act necessarily excludes the agriculturist and the stock raiser from the operation of the Act with reference to any of the contracts denounced respecting such products or live stock.

Had the Legislature in the *Illinois case*, said, in express terms, that any owner, whether a private person, corporation or association, of any kind of

property, *except an agriculturist or stock raiser*, who shall combine for certain purposes, etc., the classification would be formal and express. But because the Act includes all persons, corporations or associations from doing certain things with reference to certain kinds of property, excluding only agricultural products and live stock, while in the hands of the producer and live stock raiser, there is no classification as to persons, according to the argument of the Supreme Court of South Dakota, because there is no classification with respect to persons, but only with respect to things, upon which any combination or conspiracy of two or more persons may operate. This attempted distinction, however, was not recognized, in the opinion of this Court, in the *Connolly case*, and the operation of the law was held to be necessarily discriminatory for, as we think, precisely the same reasons that the present law should be held discriminatory, in that its operation inevitably includes some and excludes others, and that such inclusion and exclusion is based upon no reasonable grounds.

Suppose Section 1 of the Illinois Act under review in the *Connolly case* had read as follows:

“That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons or of two or more of them for either, any or all of the following purposes: First—to create or carry out restrictions in trade with reference to any and all commodities, *except agricultural products and live stock while in the hands of the agriculturist or live stock raiser*; Second—to limit or reduce the production, or increase or reduce the price of

merchandise or commodities, *except when such commodities shall be agricultural products or live stock in the hands of the agriculturist or live stock raiser*; Third—to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, *except agricultural products and live stock in the hands of the agriculturist or live stock raiser*; Fourth—to fix at any standard of figure whereby its price to the public shall be in any manner controlled or established upon any article or commodity of merchandise, produce or manufacture intended for sale, use or consumption in this state; *except agricultural products and live stock in the hands of the agriculturist or live stock raiser*, and so on with reference to each provision in said Section 1."

According to the Supreme Court of South Dakota, there would be in such Act "no attempt at classification." The Act would be general so far as its provisions are concerned with reference to all persons and would necessarily include everybody. It would merely exclude certain persons for the same reason that certain persons are excluded in the present Act, namely, because those persons would not be doing the things against which the Act was directed; and yet it is perfectly obvious that the Illinois Act, reading in the way we have supposed, would be open to precisely the same objection that was raised to it in the *Connolly case*. It is a mere subterfuge to say that there is no classification in one case because persons are not excepted or excluded, when the inevitable effect of the statute is to exclude persons or classes doing precisely the same thing, and that in another

case, the statute is unconstitutional because of a direct, formal and express exception of persons, *when such persons are the same as would be by the other Act likewise excluded.*

The distinction between the two cases is simply that which may frequently be drawn between the express words of an act and its inevitable effect. It is simply saying that a thing cannot be done directly, and yet may be done indirectly.

We have already called the Court's attention to the obvious fact that the element of discrimination between communities is superfluous, and yet the Supreme Court of South Dakota, at least in some portions of its argument, while admitting that the act is directed against "unfair competition", merely refers to the fact that a person is less likely to sell at an unduly low price his commodities at one point, if in doing so, the law compels him to sell the same commodities for the same price at each and every other point in the state, in which he may be doing business. In other words, it is claimed that such compulsion on the part of the law will have a deterrent effect on an otherwise offending dealer.

The Supreme Court of South Dakota in this connection used this language speaking with reference to classification with respect to persons committing the offense, and acts constituting the offense:

"As to the first, there may be such a classification by the statute (classification of persons) as will render such statute unconstitutional, *but not so as regards any restriction or limitations as to the acts constituting the offense.*"

This proposition is thus broadly stated, and just as broadly applied to the act in question; and herein, we think, lies the fundamental fallacy of the decision of the Supreme Court of South Dakota. As before stated, it is only too obvious that most, if not all, acts may be so framed as to include, in form at least, all persons, and yet so restrict or limit the acts, constituting the offense denounced, as, in their practical effect, to make them apply only to a limited class.

According to this proposition of the Supreme Court of South Dakota, if Section 1 of the act in question had read:

"Any person, firm or corporation, foreign or domestic, doing business in the State of South Dakota, and engaged in the production, manufacture or distribution of any commodity *in general use at two or more places in the State of South Dakota*," etc.

there would have been an improper classification but because there is not such classification in express terms, though the inevitable effect of the statute in its practical application, is to restrict its operation to precisely the same class, the Court says the act is valid.

With reference to this broad proposition laid down by the Supreme Court of South Dakota, and quoted above, it used this further language:

"Let us illustrate: While the Legislature could not make some particular class of persons guilty of murder, when such persons kill their fellow man, by some peculiar method or means, and, at the same time, exempt another class of

persons from punishment for killing their fellow man by the same method or means, *unless the attempted classification had some logical or natural relation to the method or means employed*; yet it would be clearly within the power of the Legislature to make such killing by such peculiar method or means, murder, even if the Legislature should utterly fail to pass any law whatsoever making killing by any other means or methods a crime."

This illustration used by the Court emphasizes, we think, the fallacy into which it has fallen. It only needs analysis to expose how much it falls short of proving the soundness of the general proposition. A concrete case will, perhaps, best serve to make plain the first half of the illustration. It is perhaps possible that the Legislature might properly pass an Act providing in terms that any physician who should prescribe for, or administer to a patient any poisonous drug, from the effect of which the patient should die, would be guilty of murder. Even though only physicians were included in the act, the classification might possibly be held proper, for the reason that physicians are presumed to be familiar with the qualities of such poisonous drugs, and because it is a matter of common knowledge that, as a general rule, patients do not take poisonous drugs, except on a physician's advice.

In such a case, it might be said that the classification bore some logical and natural relation to the nature of the method or means employed, and that because of that logical and natural relation, the act might be confined to physicians.

Assuming the reasonableness of this classification, as thus stated in the first half of the illustration used by the Supreme Court of South Dakota, the particular instance may be conceded to be correct. The latter half of the illustration, however, is obviously incorrect, for the Court leaves out of consideration entirely, the question of whether or not the particular method or means referred to has any logical or natural relation to the attempted classification, and assumes that so far as method or means is concerned, they may be wholly arbitrary or even whimsical.

We submit that this is radically unsound. A concrete case, we think, will well illustrate our contention. Suppose the Legislature should enact that any man who should kill another by using a revolver in his right hand would be guilty of murder, and make no provisions for the killing of another by using a revolver in his left hand. Would not the courts immediately say that this was an attempt to make an act murder when committed by a right-handed man and no offense when the act was committed by the same means by a left-handed man? Would it not have to be held that here was a classification based solely upon the difference in the use of one's hands; in other words, an act discriminating against right-handed persons?

The mere fact that the classification must be spelled out in the use of the means, rather than in connection with the persons, could possibly make no difference. The inevitable effect would be the same in both cases.

The illustration used by the Court is, of course, an extreme one, and consequently we ought to be at liberty in illustrating the want of application of it to use extreme illustrations.

Suppose the Legislature should pass a law making it murder for a man to kill another by using a *particular kind* of revolver on *Tuesday* of any week. Could it be said that this law was unobjectionable, although the means and the time of the committing of the offense bore no relation whatsoever to the crime itself? The time and the manner and means of the killing would be so utterly arbitrary, and even whimsical, as to condemn the law. What the Court probably had in mind in stating the latter half of its illustration (but failed to express) was that it would be competent for the Legislature to make any killing of a human being in some peculiar manner, or by some peculiar means murder, without including any and all other means of committing the same offense, *provided there was any logical or natural reason for thus limiting the law to such peculiar manner or means.* In other words, provided the exclusion of other means or methods was founded upon some reasonable basis and not merely an arbitrary exclusion, which necessarily would result in discriminating against some, and in favor of others doing what might be in substance the same act.

We think it is apparent, therefore, that although the whole illustration is an extreme one, the first half of it may be sound, while the last half is utterly unsound. *The Court seems to have studiously omitted*

from the latter half of the illustration the words which it has added to the first half, and which are absolutely essential in order to make the first half of the illustration correct. The latter half of the illustration, in order to be sound, should read as follows:

"Yet it would be clearly within the power of the Legislature to make such killing by such peculiar method or means murder, provided such peculiar method or means bore some logical or natural relation to the offense denounced, even if the Legislature should utterly fail to pass any law whatsoever making killing by any other means or methods a crime."

CLASSIFICATION MUST BE REASONABLE.

At the very threshold of each attempted exercise of the police power by the Legislature, there is always the question of reasonableness; and classification of persons committing, or of method and means of committing an act, is but a subdivision of that question. The Legislature is just as powerless to make *arbitrary* and *whimsical* acts an offense as it is to make arbitrary and whimsical classifications of persons to whom a statute shall apply. Suppose, instead of the act in question, the Legislature of South Dakota had provided that any person for the purpose of destroying competition of a regular established dealer at any particular point who should sell at that point any commodity in general use for a less price than he charged for a like commodity at any other point in the state, without paying fifteen per cent of

his gross sales at all points in the state, to the poor fund at the various points where he was conducting business, would anyone contend that such a law was a reasonable exercise of the police power? In practice, such a law would inevitably apply only to those who see fit to refuse to do certain things which the statute prescribes.

There is, of course, as we have before stated, no connection between "unfair discrimination" and "unfair competition". A dealer in two or more places in the state may *unfairly* compete, without *unfairly* discriminating, and he may *unfairly discriminate* without *unfairly competing*.

"Unfair discrimination", as apparently defined by the statute, neither adds to nor takes from the fact or the effect of "unfair competition." The argument of the Court is that a dealer at two or more places in the state will not be as likely to unfairly compete at one point, if, under the law, he must unfairly compete in like degree at all other points.

Take a concrete case for illustration. Suppose a dealer named A, has three places of business at points X, Y and Z, and has competitors in the form of regular established dealers, at each of said points. Suppose, for any reason, he desires to get rid of his competitor at X, and, for that purpose, he cuts the prices of his commodities at that point. Such competition is called unfair; provided, however, it is not unfair within the meaning of the statute, if, as a matter of fact, he cuts prices at Y and Z correspondingly.

And again, if, in fact, he desires and intends to get rid of his competitors at all three points, and, for that purpose, cuts the prices of his commodities to the same extent at all three places, there is neither "unfair competition" nor "unfair discrimination" within the meaning of the statute, and yet, he is doing precisely the same thing at *three points, with the same intent at each point*, which the statute denounces as being "unfair competition" and "unfair discrimination" if, in fact, he is doing it at *only one point*.

It would be quite as reasonable and as logical to provide that any man who shall burn his neighbor's barn, without, at the same time, burning one of his own of equal value, guilty of arson, as to pass the act in question. If burning the property of a neighbor is an offense against such neighbor, as well as against society, the offense itself is neither increased nor lessened by the intentional burning of the offender's own barn. Yet, for precisely the same reason that is urged in the case at bar, a man who had the desire or intention of burning his neighbor's barn, might in many, if not in most instances, be deterred from so doing, if, in order to avoid the penitentiary, he must burn his own barn. It might be said that some would burn both barns, but that, generally speaking, a man would hesitate to destroy his own property in order to gain immunity from destroying the property of his neighbor. But, in any event, it would be a ridiculous and unreasonable law, and the failure to burn one's own barn could never, in reason or common

sense, be regarded as a *constituent* element of the offense of burning a neighbor's barn.

There are a few propositions of constitutional law with respect to the matter now under consideration, which have been so long and well settled as to be axiomatic. One is that legislation, in order to be valid, under the provisions of the Equality Clause of the Fourteenth Amendment to the Federal Constitution, must be uniform as to all in like circumstances within the sphere of the operation of the law, both in respect to the *privileges conferred*, and the *liabilities imposed*. It is just as incompetent for the Legislature to confer a benefit or privilege upon a special class, as it is to impose liabilities or penalties upon another special class.

Second, any classification, whether of persons or methods or means of doing any particular act, must be reasonable, and the mere fact of classification with respect to either persons or methods or means of committing an act is not sufficient to relieve a statute from the operation of the Equality Clause of the Fourteenth Amendment.

The classification must be based upon some reasonable ground,—upon some difference in fact between persons or between methods or means of committing an act which bears a just and proper relation to the object sought to be accomplished, and mere arbitrary or whimsical selection can never be justified by calling it classification.

There is, and must necessarily be, in every criminal statute some particular act, against which the sta-

tute is directed, and a completed offense may be so defined as to necessarily consist of one, two or more definite acts. For instance, an act or acts may be prohibited when done with a certain specified intent. The intent, however, must be such as to bear a just and proper relation to the object sought to be accomplished.

Larceny is generally supposed by all civilized countries to be an offense against society, and something which must be restrained by law as a basis for good order and ownership of property. Any legislative enactment which should prescribe that the taking of the property of another, except only goods imported from foreign countries, should be guilty of larceny, would be obviously bad.

It is just as necessary to the good order and peace of society that the citizen should be protected in his rights of property with reference to goods, wares or merchandise of foreign manufacture or production, as it is that he should be protected in reference to similar articles of domestic manufacture or production, and any distinction between the two with respect to the larcenous taking of the same, would be an arbitrary one, and it would necessarily follow that any classification in that respect would not bear any just or proper relation to the object sought to be accomplished. The law would obviously be conferring certain privileges or protection to one class of property owners, and denying such protection to another class. It would, at the same time, be making it an offense to steal domestic goods, wares, or merchan-

dise, and giving immunity to those stealing foreign goods, wares or merchandise, and this attempted distinction would be made at a time when the law recognized the right of importation and the right of ownership of *imported* as well as *domestic* goods.

DISCRIMINATING LEGISLATION.

Discriminations against any particular person or class of persons, especially such discriminations as are of unusual character, are obnoxious to the Equality Clause of the Fourteenth Amendment, and even where the selection or classification may on its face be not obviously unreasonable and arbitrary, yet if the inevitable operation of the law will result in bringing about an hostile discrimination against any particular class of citizens, then the law is unconstitutional.

Yick Wo v. Hopkins, 118 U. S.

The courts must not only take into consideration the purpose of the statute as disclosed by a fair construction of it, but also all those facts which are matters of common knowledge which may directly bear upon the same.

In the case of *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. Reports, page 150, this Court said:

“While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile

and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action."

In the last cited case, the Court said:

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from the states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing many cases) yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

In *State v. Loomis*, 115 Missouri, pages 307, 314, the Supreme Court of that state said:

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The difference which will support class legislation must be such as in the nature of things furnishes a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall

be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

The language of Judge Catron, in *Vanzant v. Wadel*, 2 Yerger, 260 (Tennessee) has been many times quoted, both in text books and opinions:

"Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule and the mass of the community, who made the law, by another rule."

If there is any one dominant idea apparent in the statute in question, it is that a "regular established dealer" should not be subjected to a competition which has for its purpose the destruction of the former's business. Now, if, for the purposes of the argument, it be assumed that the Legislature may properly say that the business of a "regular established dealer" is a proper subject for legislation, and that it is in the interest of the public, as well as of the individual, that the business of such "regular established dealer" should be protected and preserved, while the business of any transient dealer or solicitor or catalogue or mail order houses, or other dealers, should be left to take care of itself, without the aid of the law, no possible reason can be conceived

of why all persons who may wilfully intend and attempt to destroy the business of such "regular established dealer" should not be brought within the prohibitions of the statute. In others words, anyone who, with intent to destroy the business of a "regular established dealer," by underselling him, or by pushing competition to the point of destruction, should be within the statute.

As before stated, it would be obviously incompetent for the Legislature to say that no competitor having a certain amount of capital invested in his business should be allowed to cut prices or compete with another for the purpose of getting rid of the latter's competition, while those dealers having a less capital would be at liberty to do the same thing. In other words, no classification would be proper which would permit one *competitor* to do certain things which another *competitor* is forbidden to do, merely because the former had less capital invested than the latter; and yet it might well be argued that where two competitors are seeking to obtain the same trade in a particular community, one of them will not attempt to drive the other out of business, *unless he is so situated financially that he may feel confident of his ability to tire out his competitor.*

The argument may well be advanced in such cases that where the capital invested in each business is about the same, both competitors will be deterred from undertaking a war of extermination which each may feel, on account of the capital of each being about the same, he will be unable to successfully car-

ry on. Consequently, it might be said that the Legislature may not make the law apply in certain instances where competitors have small capital invested, because in such cases the evils sought to be remedied are not likely to occur.

In *State v. Fire Creek Coal & Coke Co.*, 33 West Va. 188, the Supreme Court of Appeals of that state held a statute unconstitutional which prohibited persons and corporations engaged in mining and manufacturing, and interested in selling merchandise and supplies, from selling any merchandise or supplies to their employees at a greater per cent of profit than they sell to others not employed by them.

And in *State v. Goodwill*, 33 West Va. 179, the same Court held a statute unconstitutional which attempted to prohibit persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper except such as was specified in the Act.

In *State v. Fire Creek Coal & Coke Co., supra*, the defendant was indicated under the Fourth Section of Chapter 63, Act of 1887 of the State of West Virginia. That section read as follows:

"That it shall be unlawful for any person, firm, company, corporation or association engaged in mining or manufacturing, and who shall be interested in merchandising, to knowingly and wilfully sell any merchandise or supplies whatsoever to any employee at a greater per cent of profit than merchandise and supplies of the like character, quality and quantity are sold to

other customers, buying for cash, and not employed by them."

A violation of this act was made a misdemeanor and was punishable by a fine not exceeding one hundred dollars, nor less than twenty-five dollars. We think the purpose of this act is obvious. In the state of West Virginia, there were large mining and manufacturing operations, carried on very largely by corporations, which employed a large number of men. These corporations very generally conducted large stores in connection with their mines and manufacturing operations. These stores were largely patronized by their employees, and it was supposed that such employees were in the main compelled by their necessities to purchase from such stores. Because of this condition, it was supposed that the corporations could easily take advantage of their employees and charge them a larger percentage of profit than they could well charge to outsiders. In fact, it was claimed there, as it has been claimed in many other instances of a similar character, that the corporations did, in fact, take advantage of the condition of their employees and thus charged larger prices.

This conduct on the part of the corporations was regarded as an unjust discrimination between customers, or between the two classes of customers, employees and outsiders. This law was, it was claimed, passed in the exercise of the police power, for the purpose of protecting the employees of mining and manufacturing companies against unjust discriminations.

It was held to be unconstitutional on two grounds: First, because it was discriminatory, and, second, because it was an unwarranted interference with the right of contract.

The Court said:

"It is an attempt on the part of the Legislature to do what, in this country, cannot be done; that is, to prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employee."

The Court further said:

"It is unnecessary to illustrate the vices, the crudities, and the injustice of the statute. That it is an attempt to do for private citizens, under no physical or mental disabilities, what they can best do for themselves, is apparent. It selects miners and manufacturers as a class, and denies to them privileges which are not only proper and legitimate in themselves but to some extent necessary and unavoidable in the conduct of business; privileges which concern private affairs solely, and which are enjoyed by all other classes and citizens."

The crudities, however, of this West Virginia Act are not as pronounced as are the obvious ones of the Act in question. In the West Virginia Act it is only those who shall knowingly and wilfully sell any merchandise or supplies whatsoever to any employee at a greater per cent of profit than *merchandise and supplies of a like character, quality, or quantity* are sold to other customers, not employees, for cash, who are within the provisions of the statute.

In the South Dakota Statute, there are no such limitations whatever. The benefits of the South Dakota Statute are conferred only upon the "regular established dealer" while the liabilities are imposed only upon those having two or more places of business in the state, and a violation of the statute occurs whenever the latter shall sell at one point in the state any commodity in general use at a less price than he charges for such commodity in another section, community, or city, after equalizing freight rates. There is, therefore, no latitude whatever for the dealer with reference to sales for cash or on credit, or in consideration of friendship or charity, or for sales in small or large lots. The only test of "unfair discrimination" is that the dealer does, in fact, for the purpose of destroying the competition of a "regular established dealer" sell any commodity, whether for cash or on credit, to a friend or to a stranger, in large or small quantities at one point for a less price than he may charge for a similar commodity at another point in the same state, after equalizing freight rates.

In a given case, therefore, if a dealer was intending to destroy the competition of his competitor, and should make a certain price on a commodity at the point of competition more than he charged at another point in the State, under any circumstances, without any qualification by reason of the character of the sale, whether by cash or on credit, to a friend or to a stranger, or to a charitable institution, or in small or large quantities, he is guilty of an offense.

The following quotation from the opinion in *re Jacobs*, 98 N. Y. 114, is peculiarly pertinent here:

"Such legislation may invade one class of rights today and another tomorrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry and cause a score of ills while attempting the removal of one."

**DISTINCTION BETWEEN CLASSIFICATION OF PERSONS AND
OF ACTS CONSTITUTING THE OFFENSE.**

The Supreme Court of South Dakota said:

"Appellant says that the following persons are without the law:

(A) Persons who sell at one place only.

(B) Persons who sell at two or more places, but who with the intent and purpose of destroying a competitor at one of such places, make the same low prices which are necessary so to do at both places.

(C) Persons who sell at two or more places and who, with the intent and purpose of destroying a competitor at each place make the necessary low prices at all places.

A complete answer to this contention is, that the persons above specified are without the law,

not because they are left out by any classification created by such law, but rather because in each of said cases there would be lacking one of the elements going to make up the particular criminal act created by this statute, to-wit, discrimination between two points. As we have said, there is no attempt at classification by this act. The only classification claimed by appellant is a classification as to persons, yet this law applies to every existing person, partnership or corporation without regard to wealth, age, situation, color or any other method of distinction. In the determination of whether a crime has been committed, there are always these two things at least to be considered: First,— *the persons committing the offense*; and second,— *the acts constituting the offense*. *As to the first there may be such a classification by the statute as will render such statute unconstitutional; but not so as regards any restriction or limitations as to the acts constituting the offense.*"

(Transcript of Record, page 26).

Crime is necessarily personal. However an offense may be defined or described, there must be some person to whom the act may apply. In other words, there must, in order for the act to be effective, be somebody capable of committing the offense, and in case the acts against which the Statute may be directed are committed, there must be somebody who, in a legal sense, is responsible for their commission. Criminal Statutes, therefore, are never impersonal. They must be directed against persons. The distinction which the Supreme Court of South Dakota has attempted to draw between classifications of persons committing the offense, and of the acts con-

stituting the offense, finds no support in any of the decided cases.

In *Cotting vs. Kansas City Stock Yards Company*, 183 U. S., 79, the Kansas Statute was general in its language so far as its form was concerned, and included all stock yards coming within a classification as defined, but in the application of that statute, only one stock yard could commit the offense.

The Statute defined in general language what should constitute public stock yards, and then undertook to fix rates for charges in such public stock yards. While the language was general, the application of the Statute was necessarily special and the Statute was held unconstitutional as being based upon an arbitrary and unreasonable classification.

The reasoning of that case is peculiarly applicable to the case at bar.

In the case of *McLean vs. Arkansas*, 211 U. S., 539, the question of whether or not a certain classification was reasonable, was fully discussed and decided by this Court, and held under the peculiar circumstances of the case to be reasonable, and yet if the contention of the Supreme Court of South Dakota in the present case is sound, no question of classification ought to have been raised in that case.

There the Act, in terms, applied to all mine owners or operators of coal mines, but the offense consisted in doing certain acts with reference to weighing coal where ten or more men were employed under ground. There, as in the case at bar, certain things were

essential to the commission of the offense, and that was screening coal before it was weighed where the owner or operator was employing ten men or more under ground. There, as here, the mine owner or operator committed no offense unless he did *certain things* under *certain conditions*. Here no dealer is subject to this act unless, under certain conditions, he does certain things. The Supreme Court of South Dakota says that any classification which may possibly result in the operation of the act is in the nature of restrictions or limitations upon the acts constituting the offense, and does not relate to the persons themselves committing the offense. As before stated, this, we think, is a mere verbal distinction without any real difference.

We have already called attention to the case of *Connolly vs. Union Sewer Pipe Co.*, 184 U. S., 540, in which the attempted classification was held to be unreasonable and void; and there, in express terms, the act applied to all, and only certain products were excluded from the operation of the act. In other words, that case would seem to fall expressly within that class of things with reference to which the Supreme Court of South Dakota says there can be no question of classification. In other words, in the *Connolly case*, the classification resulted from limitations placed by the Statute upon the acts necessary to constitute the offense. It is, we think, unnecessary to cite the numerous cases from various jurisdictions, State and Federal, wherein the classification has been either with reference to persons, or

arises by necessary implication from the operation of the act. In none of the cases which we have examined have we found any suggestion which either directly, or by inference, supports the contention of the Supreme Court of South Dakota in the present case. A "regular established dealer" at any particular point in the State of South Dakota is, by the terms of this Statute, necessarily favored as against any dealer who may be conducting two or more places of business in the same State.

Looking to the language of the Supreme Court of South Dakota, as it appears on page 27 of the Transcript of Record, it will be seen that that Court is constantly dwelling upon this alleged distinction between a formal classification as to persons, and a classification resulting from the means by which the alleged offense may be committed.

The Court said, referring to the Appellant's contention with reference to arbitrary classification:

"It is resting on an alleged arbitrary classification of persons based upon their conditions. *And yet in the words above quoted, it will be seen that what it is now complaining of is not that the law does not reach all persons, but rather that the law does not reach all the means which may be used to bring about the wrong aimed at.*"

This seems to us obviously unsound. Let us analyze the Act and see what the purported essential elements are. First, there must be a "regular established dealer" at a particular point. Second, there must be some person who purposes and intends to

destroy the competition of that "regular established dealer." Third, the person must sell his goods at the point of competition with the "regular established dealer" at a less price than he is selling them at some other point in the same State, after equalizing freight rates.

The Supreme Court of South Dakota contends that there is no classification as to persons; that the Act necessarily applies to all because in the first part of Section 1, it expressly refers to all, and yet it seems to be conceded by the Court that only a particular class of dealers can possibly commit the offense denounced by this Statute, because no dealer can commit it unless he has the intention of destroying the competition of a "regular established dealer", and unless, in fact, he is dealing at two or more points in the same State.

We cannot possibly conceive of any distinction between the practical effect of such a Statute as this, and one which in terms said "any person who may be dealing in two or more places in the State of South Dakota, etc."; or between the Act in question and one which, after referring to all persons, should expressly exempt from the operation of the Act any person who was only conducting a place of business at *one* point in the State. No one, we think, can possibly suggest any difference in the practical operation of statutes worded in any of the above mentioned ways.

Gulf, Colorado & Santa Fe Ry. Co. vs. Ellis, 165

U. S., page 150.

Southern Railway Co. vs. Greene, 216 U. S., page 400.

ANALYSIS OF THE ACT AS TO ITS BASIS OF CLASSIFICATION.

We are not unmindful of the fact that this Court, (if it be reasonably possible) will sustain the Act in question, and, in the effort to do so, it will look for the underlying principle of classification which the Legislature had in mind in framing the Act.

Yet, while this is the general rule, this Court has aptly remarked in the case of *Gulf, Colorado & Santa Fe Ry Co. vs. Ellis, supra* :

“While good faith and a knowledge of existing conditions on the part of a Legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand in no manner restraining State action.”

The rule about the limitation of the power of the Legislature in this respect, while it may be stated in different ways, is settled. The question is always of its application, and as that is the question here, it becomes all important to discover accurately, at the outset, the basis of classification upon which this Act proceeds.

The Act in its operation is confined to intrastate dealers. It created, for its purpose, and is limited in its application to, but one class of such dealers, viz.,

persons dealing in any commodity in general use, who, intentionally, for the purpose of destroying the competition of any "regular established dealer" in such commodity, sell such commodity at a lower price in one section of the State than they charge therefor in another section. All other dealers are outside of this class and exempted from the operation of the Statute. It is not the purpose or effect of the Act to prevent discrimination between different sections or places. The obvious purpose is to punish a certain class of persons who cut prices in competition with a rival dealer with the intention of destroying the competition of such rival dealer. *Discrimination* between places, by selling a commodity lower at one place than another is both *just* and *lawful*. Difference in price at different places is naturally and necessarily produced by different economic and trade conditions, and as these differ, the prices legitimately and properly differ and the use of the word "discrimination" in this Act adds nothing thereto.

The lawful and proper act of selling a commodity at different prices at two or more places has no necessary or natural relation to the act of cutting prices in order to crush a competitor. The inherent wrong of the act of cutting prices to destroy the competitor is exactly the same whether the person so doing *sells goods at other places or not or sells goods at like prices at other points or not*.

In this case it could make no difference in the consequences to the Mitchell Lumber Company whether the commodity sold at a cut price by defendant at

Leola was or was not sold at a different price at Ipswich or elsewhere. *Nor could the fact of defendant's selling at a different price at Ipswich be in any way conclusive as to its intent to destroy its Leola competitor.*

It is then clear that a difference in prices between Leola and Ipswich has no apparent natural or inherent relation to the evil sought to be forbidden by this Statute or the intent of the person committing it.

Thus we have an attempt on the part of the Legislature to classify the persons who shall come within the operation of this law, by reference to the existence or non-existence of the situation or circumstances of the subjects classified, which has no inherent or natural relation to, or effect upon, the prohibited act.

This classification is plainly not based upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in the different classes as suggests the necessity or propriety of different legislation with respect to them. Clearly the basis upon which this classification proceeds rests upon no just relation to the prohibited act. The basis of classification has reference to the character or situation of the persons classified and brought under its provisions, and not to the character of the act committed.

The prohibited act is just as inherently wrong and just as fatal to the competitor sought to be protected, when committed by any one of the classes created by

the Statute as by any other. The character and effect of the act discloses no reason upon which to base the discrimination whereby one class of persons comes under the prohibition of the Statute and others do not.

Under this classification the following persons are *not within the law*.

- (a) Persons who sell at one place only.
- (b) Persons who sell at two or more places, but who, with the intent and purpose of destroying a competitor, at *one* of such places make the same low prices which are necessary so to do at both places.
- (c) Persons who sell at two or more places and who with the intent and purpose of destroying a competitor at *each* place make the necessary low prices at *all* places.

For illustration, the persons in class (a) who sell at one place only (and the great majority of business men are in this class), may, under this law, with the intent and purpose of destroying a competitor, lawfully sell or give away their goods, and accomplish the very evil which the Statute condemns, if it is brought about by the same method, at the same time and place by a person operating a business at some other point where he maintains his prices.

It is clear that such acts by this large and favored class are just as injurious to society and the competitor, and that the great mass of dealers within the State are left free to do the very acts, with the same results, which are made criminal if done by a comparatively small number of dealers.

Such classification is purely arbitrary and fanciful. It is based alone upon a distinction between the persons classified. It does not "*rest upon a difference which bears a reasonable and just relation to the act in respect to which the classification is proposed.*" The condemned persons are only those who do business in more than one place and who may be able to mass their resources upon the point of the objectionable competitor; in other words, persons of larger financial resources or persons having a more strategically arranged business than those whose business position is confined to one point only. A person's *wealth*, or *business ability* or *opportunities* are not a proper basis for legislative classification. The State may "not say that all men beyond a certain age shall be alone thus subjected, or all possessed of a certain wealth."

The theory of this law is that the dealer who operates in different communities may lower his prices at one place for the purpose of destroying competition and his losses will then be made good by his profits at other points where prices are not cut. This theory is the basis upon which the attempted classification proceeds, and amounts to *nothing more or less than financial ability to compete.* What difference can it make in a competitive struggle whether losses are made good from profits made in other places or from wealth already acquired? Take the case of two rival dealers doing business at but one point in the same line of merchandising. One is worth ten thousand dollars, the other one hundred thousand dollars. If

the latter sells a commodity at a loss and destroys the competition of his rival, he can make up his losses from his greater store of wealth. Now, in such a case, under this law, there would be no crime. But if the losses in this competitive struggle were made up from profits made in sales at other places, then under the law there would be crime though the acts, the intent, the effect, and everything connected with the competition were exactly the same.

If the law can stand upon such a basis of classification—difference in financial ability to compete, of the persons classified—it would be good if it condemned and made criminal the lowering of prices at one point for the purpose of destroying competition there, by any one, who operated a business, whether of the same kind or not, in more than one place, unless he lowered his prices on the different commodities sold at other places in proportion to the cut at the point of competition, for example: Upon the same classification a merchant who owned and operated a dry goods store in one place and a hardware store at other points, so that he might be able to lower his dry goods prices to destroy competition in that line at that point, and maintain himself there, out of the profits of his hardware stores at other points where prices were not cut, might by valid act of the Legislature be forbidden to lower his dry goods competition at that point, unless he lowered his hardware prices accordingly at all other places. Such a classification would be on the same basis. It would be a classification of men upon the basis of their

financial ability or business opportunities. Such a classification would proceed on the same theory as the one under consideration, and it would be for the same purpose, viz., placing a species of hydraulic pressure upon a person's business so that one act of competition would be felt at all points, and so disable him to compete at one point by keeping prices up at others. *This is the only purpose and effect of the Statute in question in forbidding the lowering of prices of any commodity at one place unless lowered alike at all other places.*

A person who operates a store at one place, wherein he sells both groceries and hardware, and stores at other places where he sells only groceries, can lawfully sell his hardware at such price, and with the intent and purpose prohibited by the law so as to destroy his hardware competitor, but cannot likewise attack his grocery competitor without reducing grocery prices all along the line. To give away a pound of nails in this case in pursuance of a plan to annihilate a competitor is harmless, while for the same person at the same time and place to sell a pound of sugar at a modified price with a view of destroying his competitor, is a crime. The same person, at the same place, within the same hour, repeats the same act, for the same purpose and with the same effect. Once it is innocent, again it is criminal. It ought to be clear that there is no difference in these acts upon which to base a classification of citizens of a republican government. It must be kept in mind that the Court will, in determining this question, look to what

may, within reasonable expectation, happen under the law.

As to class (b), the dealer who carries on a line of business at two places may, if he will, so reduce prices at both places, with the forbidden intent, as to destroy his competitor at one place only, and accomplish this purpose with impunity, and thus we have another class of persons who are favored because they in no way are subject to the law. If the defendant had in this case put down its prices at both Leola and Ipswich with the intent of destroying its competitor, the Mitchell Lumber Company, at Leola, it would not have offended against the Statute, simply because it maintained uniform prices at both places. All of the suggestions about the basis of classification made regarding class (a) apply equally here. The distinction is made between the persons arbitrarily and has no relation to the nature of the act condemned.

Now as to class (c) it is equally clear that if this defendant had a competitor both at Leola and Ipswich, and it had been doing business at those places only, it could, without violating this law, though with the intent to destroy both competitors, cut prices at both points and continue to do so until its purpose was complete. And the law, if it is valid, *affords the remarkable situation of an act done by a man at one place being criminal, while the same act done by the same person at two places, with the same intent and purpose, and having the same result, is perfectly lawful.* Again, any person may, at his own will, move

from the prohibited classes under this Act. The man who owns lumber yards at Leola and Ipswich and is within the operation of the law may sell his Leola yard and then cut his Ipswich prices with the intent and purpose condemned by the law, and may, in fact, destroy his competitor there without violating this law. The evil done would be exactly the same as if both yards were in operation when it would have been unlawful. This law says to every dealer, you may cut prices with the intent of destroying a competitor, and thus accomplish that purpose with perfect impunity, provided you are not doing a like business in another locality. If you are doing business in two localities, and wish to crush out your competitor in both places by cutting prices for that purpose, you may lawfully do so, provided you make no difference in your selling prices between the two localities. You may put your goods at both places below a living price for the purpose of crushing out your competitor at each place, and you have done no wrong under this law, but if through any motives toward one of these competitors, you maintain the market price at his town, but cut prices at the other, and thus destroy only one competitor, you are guilty under this law. *You may ruin two competitors with impunity, but if you ruin only one you are guilty.*

This Act puts all dealers in the same commodity in more than one place in a separate class, and inflicts a penalty upon them for doing exactly what the dealer at one point may freely do. This is so because the price at which the dealer in several places sells

at points other than those of the forbidden competition in no way affects the market in the community, and its reduction at such points can in no way benefit such community; such points may be so distant as to make that impossible. *The only purpose and effect of the Act is to penalize this class of dealers for selling cheap at the place of the competition, and the greater number of points at which this class of persons does business, the greater the penalty. The great mass of dealers are in no way subject to this penalty although they commit the same acts.*

Looking at the operation of the law from the other point of view, we find that the merchant dealing in the same commodity in several communities may be attacked by a single point dealer in one or all places with the intent and purpose forbidden by the law, and his business wholly destroyed, but the offending dealer have committed no offense.

The Act not only imposes great burdens upon those in the class discriminated against, but confers corresponding favor upon all others of the favored class. It is evident from a reading of this Act that if the rule limiting the power of legislature to classify, which we have discussed, is departed from, the door will be open for evils which are destructive of the republican principles of equal protection of the law.

The only possible justification of a law of this kind is that no dealer, as a matter of public policy, ought to be permitted to carry competition so far as to intentionally ruin the business of another, and that such action ought to be made universally unlawful.

This law, in order to be sustained, must be brought within the principle that no man ought to be allowed to use his own property or conduct his own business so as to destroy the property or business of his neighbor. If such were the scope of the Act, the only question would then be whether it was unwarranted restraint upon the liberty of contract.

The evil, if any, which this law is aimed at, is not discrimination between places, but competition with the purpose on the part of one competitor to destroy the business of another.

Now, a retail dealer operating a single store in a hamlet away from a railroad in which he has but one competitor may, if he chooses to do so, and has the capital to continue a course of competition, effect the ruin of that competitor; and is not the evil just as great, the wrong just as much to be condemned in him, as it would be in the case of a dealer doing business in a number of towns, and who crushes out in the same way independent dealers seeking to establish business in competition with him?

The following are cases bearing directly upon the question of classification :

Barbier vs. Connolly, 113 U. S. 27;

State vs. Loomis, 115 Missouri, 807;

Lavallee vs. Railway Co., 40 Minn., 249;

State vs. Ashbrook, 154 Missouri, 375 (55 S. W. Rep. 627);

Lawton vs. Steele, 152 U. S., 133, 137;

Dobbins vs. Los Angeles, 195 U. S., 223;

People vs. Keynes, 120 N. Y. S., 1053;

Webb vs. Downes, 93 Minn., 457;
State vs. Fire Creek Coal & Coke Co., 23 W. Va., 188;
Ballard vs. Miss. Cotton Oil Co., 81 Miss., 507;
Froer vs. The People, 141 Ill., 177;
Imboden vs. The People, 90 Pac. 623 (Col. Sp⁴ Ct.)
A. & N. Ry. Co. vs. Baty, 6 Neb., 37;
Low vs. Rees Printing Co., 41 Neb., 127;
Lancashire Insurance Co. vs. Bush, 60 Neb., 116;
Ozan Lumber Co. vs. Union County National Bank, 145 Fed., 344;
Peonage Cases, 123 Fed., 671;
Sellers vs. Hyes, 163 Ind., 422;
McKinster vs. Sather, 163 Ind., 671;
State vs. Associated Press, 60 S. W., 91 (Mo.);
Miller vs. Crawford, 70 Ohio St., 207;
Lappin vs. District of Columbia, 22 App. D. C., 68;
State vs. Whitcomb, 122 Wis., 110;
Ex parte Leo Jentzsch, 112 Cal., 468;
Bassetts vs. The People, 193 Ill., 334;
City Council vs. Kelly, 142 Ala., 552;
In re Aubrey, 36 Wash., 308;
People vs. Zimmerman, 102 App. Div., 103;
Grainger vs. Douglas Park Jockey Club, 148 Fed., 513;
Heim Brewing Co. vs. Belinder, 97 Miss. App., 64;
Whitwell vs. Continental Tobacco Co., 125 Fed. 454;

Smiley vs. McDonald, 42 Neb., 5;
Luman vs. Hutchins, Md., 46 L. R. A., 393;
Huber vs. Merkle, 117 Wis., 355;
Block vs. State, 113 Wis., 205.

We will close the discussion of this particular point by quoting further from the opinion of the Supreme Court of South Dakota:

“As we have said, there is no attempt at classification by this act. The only classification claimed by appellant is a classification as to persons, yet this law applies to every existing person, partnership, or corporation without regard to wealth, age, situation, color or any other method of distinction.”

And again,

“Under the view which we take of the statute now before us, it is unnecessary to determine what the proper rules for such classification are, and attempt to apply them to the provisions of this statute, for the reason that it appears clear to us that there is absolutely no attempt at classification in this statute.”

This would be an easy disposition of the question of classification if the facts justified it. As we have seen, however, while this Act by its terms purports to apply to “any person, firm or corporation, foreign or domestic, doing business in the State of South Dakota”, yet when it specifies the acts constituting the offense, those acts are such that by *far the larger number of dealers in the State cannot commit them*.

May a Court in disposing of the question of classification look only at the letter of the act and wholly

ignore its spirit and inevitable effect? If only a limited number of dealers in commodities in general use are affected by the Act, and all others in the same class dealing in the same commodities at the same time and place and under the same conditions are not affected, *how can it be rightfully said that there is no classification?* Can it be denied that the dealer in one place cannot commit this crime and that only the dealer in two or more places can commit it? And, if this be not classification, what is it?

In the case of *Mugler vs. Kansas*, 123 U. S., 61, this Court said:

“The Courts are not bound by mere forms, nor are they to be misled by mere pretenses; they are at liberty—indeed are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether or not the Legislature has transcended the limits of its authority.”

And in the case of *Cotting vs. Kansas City Stock Yards Co.*, *supra*, this Court dealt with a statute as general in its terms as the one under consideration, and said:

“Accepting, however, the full force of the general language in which the statute is couched, it appears that a classification is attempted between stockyards doing a large and those doing a small business.”

It will be noticed that in the *Drayton case* the Supreme Court of Nebraska cites the case of *Waters-Pierce Oil Company against Texas*, 19 Texas Civil Appeals, 44 S. W. Reporter, page 936, and refers to

it as an "*instructive and well considered case*" upon the general subject involved in the case then under consideration.

That case involved the Texas Anti-Trust Acts (1889 and 1895) and one of the objections made to the Act of 1895, was that the Act exempted organizations of labor, for the purpose of maintaining any standard of wages, from the operation of the Act. The Act of 1889 exempted from the operation of the act "*live stock and agricultural products in the hands of the producer or raiser*". No objection seems to have been raised to the Act on account of the latter exemption. The question of improper classification was raised and discussed in that case with reference, however, to the exemption of organizations of labor.

The Court of Appeals of Texas held that it was unnecessary to decide whether or not this exemption of labor organizations made the Act discriminatory, for the reason that if the Act of 1895 be held unconstitutional because of this exemption, then the act of 1889 remained unrepealed, and so far as the particular controversy was concerned, the judgment rendered against the Waters-Pierce Oil Company was amply justified by the latter Act.

This case was carried on writ of error to this Court and appears in Volume 177 U. S. Reports, page 28. The question as to whether or not the exemption of agricultural products and live stock in the hands of the raiser invalidated the Act was not raised in that case, either in the lower Court or in this Court, and this Court held that it was unnecessary to pass upon

the effect of the attempted exemption from the operation of the Act of 1895, of labor organizations.

This Court said, in speaking of the Act of 1895:

"It is either constitutional or unconstitutional. If it is constitutional, the plaintiff in error has no legal cause to complain of it. If unconstitutional, it does not affect the act of 1889, and that, as we have seen, imposes valid conditions upon the plaintiff in error, and their violation subjected its permit to do business in the State to forfeiture."

This decision was rendered March 19th, 1900. On March 10th, 1902, this Court rendered its decision in the case of *Connolly vs. Union Sewer Pipe Co.*, 184 U. S. 540, in which the Illinois Anti-Trust Act, in most respects like the Texas Anti-Trust Act, and like the Texas Act, exempting from the operation of the Act agricultural products and live stock in the hands of the raiser, *was held unconstitutional on account of the attempted exemption*. It will be noticed that the Supreme Court of Nebraska makes no reference whatever to the *Connolly case*, and yet it is perfectly apparent that had the point been raised in the *Waters-Pierce Oil Company case*, precisely the same question would have been presented as was decided in the *Connolly case*.

Whatever attempts may be put forth to justify the Act in question, it is clear that it operates in favor of a special class and against another special class. The inevitable effect of its operation is to hamper and stifle competition.

The language of the Circuit Court of Appeals for the Eighth Circuit in the case of *Whitwell vs. Continental Tobacco Company*, 125 Fed., 459, is peculiarly applicable to this case.

"The right of each competitor to fix the prices of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of them, is indispensable to the very existence of competition. Strike down or stipulate away that right, and competition is not only restricted, but destroyed."

Under the inevitable operation of this Act, one dealer may with impunity regulate his prices as he sees fit, and without any reference to any intention which he may entertain towards his competitors, while another dealer is absolutely prohibited under certain conditions from fixing his own prices at one point, unless, at the same time, he correspondingly readjusts his prices at the one or more other points in the same state in which he may be doing business. The independent dealer having but one place of business, is absolutely unhampered. The dealer having two or more places of business, is obviously restricted and his right to compete impaired.

We respectfully submit that this Act is discriminatory and, therefore, unconstitutional for the reasons, *first*, that it confers privileges and advantages upon a special class, to-wit, the "regular established dealer", and, *second*, imposes obligations, conditions and liabilities upon another special class, to-wit, dealers having two or more places of business.

II.

THE ACT IN QUESTION UNREASONABLY INTERFERES WITH THE RIGHT TO CONTRACT AND TO HOLD, USE AND DISPOSE OF PROPERTY, AND THUS DEPRIVES THE PLAINTIFF IN ERROR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

Without entering into that field of controversy involving the question of whether or not there are any such things, under our Government, as *absolute* rights with which it is incompetent for either the Federal or State Governments to interfere, or in any substantial way to restrict or limit, we shall content ourselves with discussing the authorities which bear directly upon the point that any interference with the right to contract, and with the right to pursue the usual and ordinary vocations of life and business, to acquire, hold, use, sell and otherwise dispose of property which is not reasonably necessary in order to preserve the public health and safety, and to promote the general (not special or private) welfare, is clearly unconstitutional as being in violation of those guaranties contained in the Fourteenth Amendment to the Constitution of the United States.

In this connection we shall treat the Statute as one directed against what is termed "unfair competition" and "unfair discrimination", and later shall discuss the theory upon which the Courts of Nebraska and South Dakota have attempted to uphold

the Statute, to-wit, as one directed against "monopolies."

As before stated, the policy of a Statute is usually apparent upon its face, and this Court has held, on many occasions, that such policy must be determined from the language used, and from those facts and circumstances of which the Court may take cognizance, as matters of public knowledge; and that it will not be presumed, in order to sustain its constitutionality, that the Legislature had some hidden, unknown or obscure reasons for passing the Act in question.

In Hale vs. Henkel, 201 U. S., page 43, this Court said, on page 74 of the opinion:

"The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. His rights are such as existed by the law of the land antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the constitution."

In Live Stock Association vs. Crescent City, 1 Abbott, C. C., 388, the Court said:

"We may safely say that it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit, without unreasonable regulation or molestation. It is also his privilege to be protected in the possession and enjoyment of his property so long as such possession and enjoyment of his property are not injurious to the community; and not

to be deprived thereof without due process of the law.

These privileges cannot be invaded without sapping the very foundation of republican government. A republican government is not merely a government of the people, but it is a free government. Without being free, it is republican only in name, and not republican in truth; and any government which deprives its citizens of the right to engage in any lawful pursuit, subject only to reasonable restrictions, or at least subject only to such restrictions as are reasonably within the power of government to impose, is tyranical and un republican."

In *Butchers' Union Company vs. Crescent City Company*, 111 U. S., page 746, this Court defined liberty of contract, saying:

"The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

And again, in *ex parte Virginia*, 100 U. S., page 366, the same Court said:

"It is the clause declaring that no State shall 'deprive any person of life, liberty or property without due process of law' which applies to the present case. This provision is found in the constitutions of nearly all the States, and was designed to prevent the arbitrary deprivation of

life and liberty and arbitrary spoliation of property. It means that neither can be taken, or the enjoyment thereof impaired, except in the course of the regular administration of the law in the established tribunals. It has always been supposed to secure to every person the essential conditions for the pursuit of happiness, and is, therefore, not to be construed in a narrow or restricted sense."

The following quotation is taken from the opinion in *Powell vs. Pennsylvania*, 127 U. S., page 678:

"With reference to these liberties, it has been held many times that they cannot be denied or impaired by the pretense that a Statute in terms denying or impairing them is one passed in the exercise of the police power of the State."

In *Mulger vs. Kansas*, 123 U. S., page 623, it was said:

"It does not at all follow that every statute, enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police power of the State. The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

In *Niagara Fire Insurance Co. vs. Cornell*, 110 Fed., 816, the Court said:

"If the pretense urged by some that legislatures and municipal councils can declare public policy, and then, by the exercise of the police power make all business otherwise legitimate unlawful, then we have a written constitution to no purpose."

In *Allgeyer vs. Louisiana*, 165 U. S., page 578, this language was used:

"The 'liberty' mentioned in that amendment—the Fourteenth Amendment—means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to work and live where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary or essential to his carrying out to a successful conclusion the purposes above mentioned. * * * In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto. * * * The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it."

In *Lochner vs. New York*, 198 U. S., page 45, this Court held that a State Statute, which attempted to limit the hours of labor in bakeries, was an arbitrary and unnecessary interference with the liberty of the citizen to contract. In that case, however, there was a well defined ground for the exercise of the so-called police power, to-wit, the health of the citizen.

It was conceded in that case that the powers of the State with respect to the safety, health, morals and general welfare of the public are broad and comprehensive, and that whenever there is any well founded general opinion that any particular occupation is un-

healthful or unsanitary, and that regulation thereof may be necessary in order to preserve the public health, any such reasonable regulations as may directly relate to the public health may be sustained as a proper exercise of the police power.

And it was further conceded that the liberty of the citizen and his right of freedom to contract would not be allowed to override any reasonable exercise of such police power. But the Court said:

"When the State, by its Legislature, in the assumed exercise of its police power, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employe), it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the State."

It will be noticed that in the *Lochner case*, the Statute was directed in terms against the employer. It read: "*No employe shall be required or permitted, to work, etc.*" But, in considering the effect of this Statute, although the penalties thereof were not to be imposed upon the employe, it was just as important to consider his right to contract as it was the right of the employer. And so, in the case at bar, it is not merely the right of the individual dealer to sell his goods and wares at any price he may see fit to do so, but also the right of a particular purchaser to buy goods and wares at any price which the seller

may see fit or be willing to make.

The law of South Dakota affects the rights of both the *purchaser* and of the *seller*, and interferes with and prohibits them from entering into contracts which both parties, except for the law, would be willing and glad to make.

But with reference to the broad powers of the state with respect to the safety, health, morals and general welfare of the public, Mr. Justice Peckham, writing the opinion in the *Lochner case*, said:

“It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the Legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for.”

With reference to this kind of legislation, the Court in that case, decided in 1905, observed, what is now a matter of common knowledge, that “*This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase.*” And it is likewise a matter of common knowledge that most, if not all, of this and similar sort of legislation is enacted, not in response to any general demand of the

public, but rather of particular classes, organizations and associations. It originates usually in some particular organization or association, which conceives such legislation of interest or advantage to its members. It prepares the bill, secures its introduction in the legislature, and by magnifying its own influence, politically and otherwise, is able to secure its passage.

It is because such bills are usually of special and limited interest rather than general that they do not arouse the opposition which they otherwise would. The great majority of people in a given instance may be said to be quite indifferent whether the particular legislation shall pass or be defeated. It is quite generally the case that the persistent, organized efforts of the few will overcome the indifference of the many.

In the case at bar, this legislation is manifestly designed to benefit the "regular established dealer"—to give him an advantage which is denied to the transient dealer, the ordinary solicitor, or traveling dealer, and catalogue or mail order houses. It is manifestly designed and intended to cripple the so-called "line" dealer.

The Supreme Court of South Dakota, is discussing the case, puts a hypothetical instance, and, upon this particular instance, undertakes to support the law. It is just as easy, however, to put another case, which, if not just as common, is, at least, not unusual, where the injustice of the law is perfectly manifest.

At any particular point in South Dakota where a "line" dealer is in competition with a so-called "regu-

lar established dealer" the latter may start a warfare of competition, cutting prices at perfect liberty, and with the avowed intention of securing all the trade in that community and of ultimately compelling his competitor to abandon trade at that point. If, however, the "line" dealer in response to such a challenge should conceive the purpose of not only meeting that competition but of retaliating by attempting to compel the "regular established dealer" to abandon trade at that point, the inequality of the law is immediately manifest. The right of the "regular established dealer" to do as he pleases, to conduct his business in any manner that he sees fit to conduct it, and to make such prices on his merchandise as he sees fit to make, is unaffected by this law, while the line dealer against whom he has started this war of competition, is absolutely prohibited from cutting his prices for the purpose of meeting and carrying on the competition and if necessary continuing the war, unless at the same time he shall cut prices correspondingly at any and all other points at which he may be doing business in the state.

It is not a question merely of a fair price, or a reasonable profit at one or all points, no matter what the competition of the "regular established dealer" may be, and no matter what his intentions with reference to the line dealer may be. This law raises an absolute bar to the latter's freedom of contract, and right to conduct his business in his own way, and to make such prices on his own goods as he may see fit to make. However, the war of competition may be

brought on, it is clear that one party is at liberty to do as he sees fit, while the other's freedom of conduct is, at least, impaired and conditioned, if not wholly prohibited.

The rights of customers are necessarily thus affected with respect to their dealings with either the "regular established dealer" or the "line" dealer. The right of one to sell being thus affected, the right of all customers to purchase is thus necessarily impaired.

In the *Lochner case*, the Court, in addition to the language hereinabove quoted, said :

"In every case that come before this Court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty to contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor."

The Court held in that case that the law could not be sustained upon the theory that bakers as a class were of such low intelligence and capacity as to require this legislation for their protection,—there being no warrant for the contention that on account of their lack of intelligence and capacity they were notoriously imposed upon by their employers with respect to the hours of labor.

Viewing that law, therefore, in the light of a labor law, without any reference to the question of health, it was held to be clearly not one involving the safety, the morals or the welfare of the public, and that, consequently, the interest of the public was not in the slightest degree affected by such an Act.

It was practically conceded, not only by the state, but by those justices who dissented from the prevailing opinion, that it could only be sustained upon the theory that it was a "health" law, and upon the ground that, as a matter of common knowledge, the occupation of a baker was necessarily unhealthful.

But the majority of the Court held that there was no preponderant opinion in favor of the proposition that there was anything inherently unhealthful in the occupation of a baker, when such occupation was carried on in clean and wholesome bakeries. The majority of the Court conceded that legislation tending to make the occupation of a baker healthful and sanitary would be within the police power, but contended that clean and wholesome bread did not depend upon whether the baker worked ten hours per day, or sixty hours a week, and that, consequently, any limitation upon the hours of labor did not come within the police power.

The argument was that state interference should be directed to those things which made the occupation unhealthful and the premises where the occupation was carried on unsanitary, rather than to the hours of labor.

The Court said:

"It is a question of which of two powers or rights shall prevail—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though in but a remote degree, to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

Heretofore, it has been supposed that free and unrestricted competition tended directly to the general welfare. The survival of the fittest has always been one of the laws of competition. The custom or patronage of a particular community is the prize sought for in all competition. One or more dealers who may secure all, or most, of such custom or patronage, is bound to survive, and if he succeeds in securing most or all of such patronage, it is quite likely, if not inevitable, that one or all of his competitors may be driven out of business. It is the right of every customer to purchase from whom he may see fit, and at such prices as he may be able to secure. That is the general right of the public, and with that general right the state is powerless to interfere.

If this particular act can be sustained, we can conceive of no valid objection to a law of the same import as the present one going still further and making it a penal offense for any customer to purchase any com-

modity in general use of a dealer, who for the purpose of destroying the competition of a regular established dealer makes a lower price on his goods than he is charging for the same at one or more other points in the same state.

It might well be contended that if the present law is valid and within the police power, then any person or party who should knowingly purchase from a dealer thus offending would be *a particeps criminis* and subject to like penalties. Under such conditions, not only the right of the dealer and of the customer to freedom of contract would be interfered with, but any attempted exercise of such freedom of contract would be criminal as against both of them.

In the *Lochner case*, the Court said, in speaking of the ground upon which it was sought to sustain the law, to-wit, that it was a health statute:

“Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer the right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty.”

And again,

“No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the

hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family."

Much stress is placed by the Supreme Court of South Dakota upon the proposition that this law can be sustained because it does not undertake to denounce the act of any person or corporation unless the particular act is done for the purpose of destroying the competition of a "regular established dealer." This, we think, is an obvious sophism.

In the exercise of the police power by the state where any act of one individual may be declared criminal, as affecting the health, safety, morals or welfare of the public, *the intent with which such an act is committed is immaterial, so far as the power of the state to enact the particular legislation is concerned.* It is true that the legislature may, in its discretion, only prohibit certain acts of the citizen when done with a particular intent; but, *so far as its power is concerned*, that depends entirely upon the effect of the act done, whether with a particular intent or not, and the intent with which the act may be done cannot in any manner affect the power of the state with reference to the particular act.

In the case at bar, if what is termed "unfair competition" is such that it interferes with, or impairs, the safety, the health or the general welfare of the public, then, so far as the power of the state with reference to legislation relating to it is concerned, it would be just as competent for it to prohibit or penalize

such "unfair competition" whether the same was carried on with or without a particular intent.

There are numberless laws passed by the various legislatures respecting the guarding of machinery and dangerous appliances, providing for fire escapes, etc., which have nothing to do with the intent of the employer or owner of the building, and it is never regarded as essential, in order to sustain any law which may directly affect the safety, or health of the citizen that any omission on the part of a person with respect to compliance should be with any evil intent whatsoever.

It is the failure to comply with the requirements of the law that makes the offense. Such laws are sustained upon the theory that it is within the province of the legislature to impose a duty, and, having imposed a proper duty upon the citizen, failure to comply therewith may be declared an offense.

In the case at bar, the statute, although somewhat awkwardly, attempts to define "unfair competition" and such "unfair competition" may be said to be selling at a particular point in competition with any regular established dealer at a lower price than the person is selling or charging for a similar commodity at any other point in the state. If, therefore, there is any harmful act thus defined by the statute, it is the act of selling at one point at a lower price than at another point for the purpose of competing with or destroying the competition of a "regular established dealer" at the former point.

It is the fact of such competition that must be the basis upon which this legislation can be supported, if at all, and not the particular intent with which the act may be done. By fair inference, at least, the opinion of the Supreme Court of South Dakota concedes this, for its entire argument is based, not upon the idea of "unfair competition", or the purpose for which the same is carried on, but upon these things as a means to something which is not mentioned in the statute, or, as we think, hinted at or suggested by the statute, to-wit, monopoly.

In considering, therefore, this particular statute, and assuming that it is directed against "unfair competition", or "unfair discrimination", it can be sustained, if at all, because the fact of selling at one point at less than the same dealer is selling at another point in the state, may constitute "unfair competition" or unjust "discrimination", without reference to the intent with which the act may be done.

In determining what the legislature, in the exercise of its police power may do, it is always helpful, if not conclusive, to consider what has been the general policy of the law from time immemorial, and what have been the general customs and practices of mankind with reference thereto.

What is novel is not necessarily unnatural or unreasonable; but when a novel law is proposed, it is incumbent upon the courts to consider whether that law is consistent with the general principles of the constitution and the customs of mankind, or whether it is revolutionary in its nature and in violation of,

and running counter to, such general customs and usages.

Novelty in this respect is apt to be unreasonable. It is always a question to be considered whether or not a particular law is something more than an application of an old principle to a new phase of life or conditions.

No uniform and satisfactory basis has ever been found to justify, under the American constitutions, laws against usury,—different courts giving different reasons for sustaining them. The reason which has most strongly appealed, however, to most courts is that from the most ancient times usury has been regarded as a proper subject for regulation by law by practically all governments that have ever existed. In modern times it has been suggested that it was within the power of government to regulate the loaning of money, because the coinage of money itself was a peculiar and exclusive function of sovereignty, and that because the Government, directly or indirectly, can alone coin money and make it current, it necessarily has the right to regulate the terms upon which the same should be used and loaned. Other courts, however, have thought this reason more plausible than sound, and that the constitutions of the Federal Government should not be construed as prohibiting legislation with respect to usury, for the reason that no specific reference thereto is contained in any of such constitutions, and because for centuries prior to the adoption of the American consti-

tutions legislation against usury had been universally sanctioned.

In *Gibbs vs. Tally, et al.*, 65 Pac. Rep., page 970, (Cal.), the Supreme Court of California held that a statute of that state providing that every contract required by the act to be filed by the mechanic's lien law should be accompanied with a bond for the protection of laborers or material men, and that failure to require and file such bond should render the owner of the premises liable in damages to all entitled to liens on the property, in addition to the liens provided by the law, was unconstitutional, in that it violated the Fourteenth Amendment to the Federal Constitution, as well as Article 1, Section 1, of the Constitution of the State of California.

The requirement of such bond was treated as an *unreasonable imposition and restraint upon the owner of property in regard to the use thereof.*

The Court said:

"To impose this burden upon an owner is to some extent to deprive him of his property, for the value of property consists in the right to use it."

The Court in that case quoted from *Blackstone* these words:

"The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution save only by the law of the land."

It also quoted the following language from the opinion in *Wynchamer vs. People*, 13 N. Y., page 378:

"When a law annihilates the value of property, and strips it of its attributes by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provisions, intended expressly to shield personal rights from the exercise of arbitrary power."

The Court in that case also held that it was an unreasonable and unnecessary restriction upon the power and right of every individual to make the usual and ordinary contracts in regard to his property, citing several cases.

With reference to the claim that it was passed in the proper exercise of the police power, the Court said:

"It is not—and clearly it could not be—contended that this law is a regulation which comes within what is called the 'police power.' It is not calculated, nor was it intended, to conserve the safety, health or general welfare of the community. The section does not provide for a lien, but it is contended that there is not greater interference with property rights than is found in some of the provisions in regard to lien of laborers and material men, which have been upheld, and particularly in the provisions making the contract void in case it is not filed, allowing lien of laborers, material men, and subcontractors to full value of services rendered and materials furnished, although that may exceed the contract price."

There have been many attempts by the legislatures of the different states to legislate against so-called

"trading stamps." It has been contended in support of this class of legislation that it was a proper exercise of the police power. These "trading stamps" schemes have been denounced as *gambling*, and yet they have been uniformly held by the courts not to partake of the nature of gambling.

It has been further claimed that they were essentially *fraudulent*, and that it was in the interest of the public that such fraudulent schemes should be restrained by law.

In other cases it has been claimed that the giving of these stamps led to *adulteration* of goods, and thus brought the whole scheme within the range of police power. None of these arguments have been sustained by the courts.

In *Humes vs. City of Little Rock*, 138 Fed., 929, it was held that the attempt, under the guise of regulation, to impose a license tax prohibitive in its nature upon any person, firm or corporation engaged in a business wherein the selling or giving way, distributing, or otherwise disposing of premium stamps, was an unwarranted interference with the right of contract and the right of every citizen to conduct his business in his own way.

It was distinctly held in that case that the thing sought to be licensed was not in its nature a *lottery* or *gambling*, and that it was only a scheme designed and intended, and naturally calculated to *draw trade*.

It is a matter of common knowledge that some traders resort to this scheme of issuing trading

stamps, while others do not. *It is not a matter in which the general public can be said to be especially interested one way or the other.* Those traders who do not see fit to issue trading stamps have, however, been most persistently opposed to the plan. While not willing themselves to resort to it, they have strenuously fought the plan because it compelled them to meet in some way what they termed "improper competition."

It was argued in this case that the giving of trading stamps is in no sense essential to the conduct of ordinary business enterprises, and that in the long run it was not, in fact, *useful* to any, but, on the other hand, *harmful* to some.

The Court said:

"A man has the right to earn his livelihood and support his family by following any vocation not harmful to society. It is not sufficient that it may seem useless to the Court. Things that are useless to one man are articles of prime necessity to another. * * * A large part of the pursuits of life are not of apparent utility, do nothing to secure food, shelter, or clothing to mankind, yet they assist some in that pursuit of happiness which the Declaration of Independence proclaims to be one of the inalienable rights of men."

In *Thomas vs. Hot Springs*, 34 Ark., 558, the distinction was carefully made between harmful and innocent pursuits. It was there held that while it was competent for the legislature to prohibit drumming for *gaming* houses and other *evil* concerns, it was incompetent for the legislature to suppress

drumming or soliciting for hotels, boarding houses and other legitimate forms of business.

In *People vs. Gillson*, 109 N. Y., page 389, a statute prohibiting the use of trading stamps was under consideration, and it was there held that the statute was unconstitutional as an infringement of the liberties of the citizen.

Judge Peckham, (afterwards Mr. Justice Peckham), wrote the opinion in that case.

In *Long vs. State*, 74 Md., 565, a similar decision was rendered,—the Court holding unanimously that a gift enterprise which did not involve the element of chance could not be prohibited by the legislature, though it be carried on by a merchant for the avowed purpose of inducing customers to buy his goods.

In that case it was contended that the making of *gifts* as an inducement to the sale of goods was such an *evil* as would fall with the range of the police power. The Court held that the legislative act interfered with the freedom of sale of one's goods, for the reason that the condition is imposed that no one should sell goods and, at the same time, and as part of the same transaction, give away any other thing.

In the case at bar, this law attempts to prevent a man from selling his own goods at a particular price, unless, at the same time, he is willing to sell, and does sell, his goods at another point at the same price.

In *Ex parte Hutchinson*, 137 Fed., 949, it was held by the Court that an ordinance imposing a license tax of Six Hundred Dollars per year on any person selling trading stamps to merchants, in addition to One Hundred Dollars, per year, on each merchant using trading stamps in his business, is clearly an abridgment of the privileges of citizens to engage in a legitimate business, and in violation of the Fourteenth Amendment to the Constitution.

Ex parte McKenna, 126 Cal., 429.

See also the following cases:

People vs. Dyker, 72 App. Div. (N. Y.) 308;
People vs Zimmerman, 102 App. Div. (N. Y.) 103;
Young vs. Commonwealth, 101 Va., 853;
Commonwealth vs. Moorehead, 7 Pa. Co. Ct., R. 513;
State vs. Ramseyer, 73 N. H., 31;
City Council vs. Kelly, 214 Ala., 552;
Commonwealth vs. Emerson, 165 Mass., 146;
Commonwealth vs. Sisson, 178 Mass., 578;
City of Winston vs. Beeson, 135 N. C., 271;
Hewin vs. Atlanta, 121 Ga., 723.

In *ex parte Drexel*, 147 Cal., 763, the Court very pertinently says:

"It,—issuing trading stamps,—may be distasteful to certain competitors in business but the latter should remember that if a statute suppressing it be upheld, then other oppressive statutes might be enacted unlawfully interfering with and hampering business and the right

of contract, to which these competitors would strenuously, but vainly, object."

In the case of *State vs. Dodge*, 76 Vermont, 197, the Supreme Court of that state said:

"It is further insisted by counsel for the state that the scheme aimed at,—issuing trading stamps with purchases,—is one which is demoralizing to legitimate business, but we see nothing in the prohibited business that can be thus characterized. It does not differ from the ordinary business, except, in the method of advertising, and in lawful trade inducements. It is true that this method of doing business may enable a trader to do more business than he otherwise would, and more than his competitor across the street, who does not choose to incur the expense incident to this method of advertising and increasing his business; but this furnishes no reason for prohibiting the business. *There must be something in the methods employed which renders it injurious to the public.* It is not enough, to being a given business within the prohibitory power of the legislature, that it is so conducted as to seriously interfere with, or even destroy, the business of others.

It, the statute, prohibits the carrying on of a branch of business or trade that is not affected with a public interest, and has no relation to the public health, morals, or safety, and imposes an arbitrary and unnecessary restraint upon lawful business transactions, and within the meaning of the Fourteenth Amendment to the Constitution of the United States, is an unlawful restraint upon the liberty of a person to make such contracts, and is not a lawful exercise of the police power of the legislature."

The language of the Supreme Court of Alabama in the case of *City Council vs. Kelly*, 142 Ala., 552, is es-

pecially pertinent to the case at bar. In speaking of the liberty of the citizen which is guaranteed by the Fourteenth Amendment to the Federal Constitution against state legislation, that Court said:

"It includes the right to pursue any useful and harmless occupation, and to conduct the business in the citizens' own way, without being discriminated against either by being prohibited from engaging in it or by being burdened with discriminative taxation. If it be allowed that an additional burden may be placed upon a merchant who chooses to advertise his business by offering a small gratuity to customers in the shape of these trading stamps, it would be equally lawful to place an extra burden on one who advertises his business in the papers, or one who offers, out of his own stock, a certain gratuity to every one purchasing goods to a certain amount, or one who erects a handsome sign in front of his store, etc. *So long as his manner of conducting his business does not offend public morals, and work an injury to the public, it is his constitutional right to pursue, on terms equal to that allowed to others in like business, even though his methods may have a tendency to draw trade to him, to the detriment of competitors.*"

It may safely be said that in practically every community where two or more traders are carrying on a business, each is competing with the others to secure, not merely his proportionate share of the trade, *but all the trade he can possibly get.* It sometimes happens that custom is, to some extent, personal; it goes to a particular store because of long acquaintance or friendship; or because of common interests in some enterprise, church, association, etc.

But generally speaking, the active principle of competition is either better goods or better service at the same price, or the same goods with same service at a lower price. That the legislature had in mind that unfair competition was nothing more than a deliberate intent or purpose on the part of one dealer to sell his goods at such a price as would secure the trade in a particular location is perfectly clear when we consider all the provisions of Section 1.

In the opinion of the Supreme Court of South Dakota much stress is put upon the words "destroy the competition of any regular established dealer in such commodity." The word "destroy" is commented upon as though it necessarily imported a wrongful act.

It will be noticed that there are two purposes mentioned in said Section 1; first for the purpose of *destroying* the competition of any regular established dealer in such commodity, and, second, to *prevent* the competition of any person who, in good faith, intends and attempts to become such dealer.

It may be said that every citizen is entitled to enter into any kind of legitimate business in any community where he may see fit to do so. This is just as absolutely a right upon his part as is the right of a dealer who may be established in business in a particular community to continue that business. What is meant, therefore, or what can be the reasonable construction of the words "to prevent the competition of any person, etc."? The ordinary meaning of the word "prevent" is to hinder, or ward off. Ordinarily this term would not imply any use of fraud,

duress, or unlawful coercion, or other means of accomplishing the purpose designed.

In the case at bar (even if the word standing alone would imply the use of unlawful means) in this statute no such meaning can be implied, because the particular means of preventing the competition is expressly set forth. That the phrases "destroy competition" and "prevent competition" should not of themselves imply any use of illegal means, is squarely held in the case of *People vs. Marcus*, 185 N. Y., 257, 77 N. E., 1073. There the language of the statute was as follows:

"Any person, or persons, employer or employers of labor, and any person or persons of any corporation or corporations, on behalf of such corporation or corporations, who shall, hereafter *coerce* or compel any person or persons, employe or employes, laborer or mechanic, to enter into an agreement, either written or verbal from such person, persons, employe, laborer or mechanic, not to join or become a member of any labor organization, as a condition of such person or persons securing employment, or continuing in the employment of any such person or persons, employer or employers, corporation or corporations, shall be guilty of a misdemeanor."

The argument was urged in that case that the words "coerce" or "compel" necessarily implied the use of some wrongful or illegal means, *but the Court held to the contrary*. It was said they were not intended to refer to physical violence or interference with the person of the employe. The Court in that case cited with approval the construction which was placed by this Court upon the statute under review

in *Lochner vs. New York*, 198 U. S., 45, where it was said that the words "require" or "permit" implied no use of wrongful means, but should be construed as meaning simply no employe shall contract or agree to work, etc.

In the *Marcus case, supra*, the Court said:

"In the case now before us, the mandate of the statute is the substantial equivalent of an enactment that a person shall not make the employment or the continuance of an employment of a person conditional upon the employe not joining or becoming a member of a labor organization. There is nothing in the information upon which the warrant against the defendant was issued to show that there was any interference with the freedom of Scheinbaum in deciding whether he would enter into the contract with the corporation."

So far as the second purpose disclosed by Section 1 of the South Dakota statute is concerned, a case would be clearly made out where some person should go into a particular community with the intention and desire of becoming a "regular established dealer" for the sale of some commodity in general use, and with this intention he should make some preparations to move into that particular community, such as leasing, or contracting to lease, or getting an option for a lease on a store building or making any other preliminary arrangements for establishing himself in that community, and then upon ascertaining that some person or corporation running two or more stores or lumber yards handling the same line of goods as he intended to handle, had a place of

business in that community, and was cutting prices at such a point so as to make the business unprofitable in that particular community, and he should abandon his idea and intention of locating in that community. If the dealer, having two or more places of business in the state, *intended* what his *conduct necessarily implied*, a case would be made out against him under this statute, provided he did not, at the same time, *at all the other places where he might be doing business within the state, cut his prices correspondingly*. All considerations as to the size of the community, as to whether the trade in the community would be sufficient to support more than one place of business, are utterly beside the question. If the party against whom the statute is directed cuts the price on his commodities in competition with any "regular established dealer" with the intent of securing the trade of the community, or, at least, so much of such trade as may and probably will compel his competitor to abandon business, then if such dealer, in fact, intended the practically inevitable effect of his competition, he must either cut the prices on all similar commodities at other points in the state where he may be doing business, or subject himself to the penalties of this statute.

The case of *People vs. Marcus, supra*, is one of many cases in the various jurisdictions where it has been held that any statute which forbids an employer to make any agreement with his employe not to join a labor union, infringes upon his constitutional rights of liberty.

See *Gillespie vs. People*, 118 Ill., 176; 52 L. R. A. 283; 80 Am. St. Rep., 176; 58 N. E. Rep., 1007.

Coffeyville Vitrified Brick & Tile Co. vs. Perry, 69 Kan., 297; 66 L. R. A., 185; 76 Pac. 848.
State vs. Julow, 129 Mo., 163; 29 L. R. A., 257; 50 Am. St. Rep., 443; 31 S. W. Rep., 781;
State ex rel. Zillmer vs. Kreutzberg 114 Wis., 530; 58 L. R. A., 748; 91 Am. St. Rep. 934; 95 N. W. Rep., 1098.

In the *Marcus case*, the Court held the previous cases of *National Protective Association vs. Cummings*, 170 N. Y. 315, and *Jacobs vs. Cohen*, 183 N. Y., 207, as substantially controlling the case. The argument advanced to support the statute was that labor unions were lawful, and that in the main, their purposes were legitimate and not illegal, and that as a matter of public policy, they should be encouraged rather than discouraged, and that employers should not be allowed to take advantage of their position of greater power to discriminate against labor unions.

The Court in the *Marcus Case* quoted, with approval, the language used in *Jacobs vs. Cohen, supra*. It was there said:

"A person may refuse to work for another on any ground that he may regard as sufficient and the employer has no right to demand a reason for it, but even if the reason is that the employe refuses to work with another who is not a member of his organization, it does not affect his right to stop work or to refuse to enter upon an employment. The converse of this statement must be true, and an employer of labor may re-

tors.

It has been held in many cases that it is competent for the legislature to regulate the manufacture and sale of oleomargarine, to the extent of protecting the public against fraud and deception in the sale of the same; in other words, while it is *incompetent* for the legislature to absolutely prohibit the manufacture and sale of oleomargarine in the interest of those who may produce or sell butter, it is competent to protect the public against fraud and deception with respect to oleomargarine.

After disposing of the claim that the giving of trading stamps was in the nature of a lottery, and the further contention that it intended to prevent dealing in impure, unwholesome and adulterated food, the Court said that the conviction could not be avoided that the act "*was passed for the purpose of protecting those dealers in food articles who preferred not to engage in this kind of business in connection therewith, and who therefore desired to prevent any one else from engaging in it.*"

Again, it was argued that the giving of trading stamps had a tendency to lead poor people into extravagance. The Court, among other things, said:

"The argument is directed to that class of sumptuary legislation which, while good enough in some phases, is, when carried to minute details, simply unauthorized and illegal."

With reference to those things which affect the public, and not a mere fraction of the public, the Court said:

"There is a limit to such interference, in my judgment, and there does come a time when the constitutional provision, so often herein quoted, steps in to protect the citizen."

In the case of *State ex rel. Zillner vs. Kreutzberg*, 114 Wis., page 530, the Supreme Court of Wisconsin held that the statute of 1899, which made it an offense for any person or corporation to discharge an employe because he is a member of any labor organization, was an unwarranted interference with the freedom of the citizen in making private contracts, and void as an infringement of the right to liberty and the pursuit of happiness guaranteed by both the State and Federal Constitutions. This case was decided in 1902, and is an elaborate and learned discussion of the entire subject-matter.

The decision opens with the question: "How far, consistently with freedom, may the rights and liberties of the individual member of society be subordinated to the will of the government?" After reviewing many authorities, the Court said:

"Free will in making private contracts, and even in greater degree in refusing to make them, is one of the most important and sacred of the individual rights intended to be protected. That the present act curtails it directly, seriously, and prejudicially, cannot be doubted. The success in life of the employer depends on the efficiency, fidelity and loyalty of his employes. Without enlarging upon or debating the relative advantages or disadvantages of the labor union, either to its members or to the community at large, it is axiomatic that an employer cannot have undivided fidelity, loyalty and devotion to

his interests from an employe who has given to an association right to control his conduct."

State vs. Dalton, 46 Atlantic Rep., page 234 (R. I.):

In this case the Court cites with approval the language of Mr. Justice Brown in *Lawton vs. Steele*, 152 U. S., 136:

"To justify the state in thus interposing its authority in behalf of the public, it must appear, —First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the Courts."

In *State ex rel. Wyatt vs. Ashbrook*, 154 Mo. 475; 55 S. W. Rep., 627, the Supreme Court of Missouri held that an attempted license act for department stores was unconstitutional. It was held to be special legislation in that it was not in the interest of the public generally, but only in the interest of a certain class of dealers, and that, so far as classification was concerned, it was "classification run wild." It was said that "it was special legislation unrestrained."

"To have made the act apply to all merchants of a given avoirdupois, or to those employing clerks of a designated stature, or to those doing business in buildings of a special architectural design, would have been as natural and as reasonable a classification, for the purpose in view, as the classification made by this act."

It was held that the right to buy and sell as others may, and to pursue such honest calling, vocation, or business as the citizen may choose, subject only to such restraints or the imposition of such burdens as may be required or imposed for the *general good*, were among the *inalienable rights* of the citizen, and that they could only be interfered with when reasonably necessary to protect the *general public*, and not *merely some competitors*, and that any *classification* based upon the *amount of business done or capital invested*, or upon the *fact that they carried more than a certain number or kinds of goods*, was unwarranted, and any attempt to exact a license fee from one class upon any such attempted classification was not due process of law.

In *City of Chicago vs. Netcher*, 55 N. E. Rep., page 707, the Supreme Court of Illinois held invalid an ordinance of the City of Chicago which prohibited the sale of certain kinds of merchandise in any store or place of business where certain other kinds of merchandise are sold. It was an ordinance aimed at department stores, or any general store for the sale of different kinds of merchandise, divided into separate departments.

It read as follows:

"It shall be unlawful for any person, firm or corporation doing business in this city, where dry goods, clothing, jewelry, and drugs are sold, to have exposed for sale, or sell to any person, firm or corporation, any meats, fish, butter, cheese, lard, vegetables, or any other provisions."

Among other things, the Court held, conceding that the City Council was authorized to legislate with reference to these things, that the ordinance in question was an unwarranted interference with the rights guaranteed by the constitutions of the United States and of the State of Illinois.

The Court said:

"The liberty of the citizen includes the right to acquire property, to own and use it, to buy and sell it. It is a necessary incident to the ownership of property that the owner shall have a right to sell or barter it, and this right is protected by the constitution as such an incident of ownership. When an owner is deprived of the right to expose for sale and sell his property, he is deprived of property, within the meaning of the constitution, by taking away one of the incidents of ownership. Liberty includes the right to pursue such honest calling or avocation as the citizen may choose, subject only to such restrictions as may be necessary for the protection of the public health, morals, safety and welfare. The State, for the purpose of public protection, may, in the proper exercise of the police power, impose restrictions and regulations; but the right to acquire and dispose of property is subject only to that power. The individual may pursue, without let or hindrance from any one, all such callings or pursuits as are innocent in them-

selves, and not injurious to the public. These are fundamental rights of every person living under this government. The legislature can neither, by an enactment of its own, interfere with such rights, nor authorize a municipal corporation to do so."

citing *Frorer vs. People*, 141 Ill. 171; *Ramsey vs. People*, 142 Ill., 380, and *Braceville Coal Company vs. People*, 147 Ill., 66.

In the case last cited, the Supreme Court of Illinois held "that the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty of the right to property."

It was further held in that case that a statute requiring weekly payment of wages from manufacturing, mining, quarrying, lumbering, mercantile, street, electric and elevated railway, steamboat, telegraph, telephone and municipal corporation and every incorporated express company and water company, was an unconstitutional discrimination between those corporations and others which are organized for pecuniary profit and employ labor.

In that case, the Court held that:

"It would take judicial notice of the fact that there were many corporations or classes of corporations doing business in the State of Illinois outside of those enumerated."

In *People vs. Warden of the New York City Prison*, 157 N. Y., 116, it was held that an act of the legislature forbidding all but duly appointed agents of

transportation companies to engage in the business of ticket brokerage, is a violation of the liberty guaranteed to citizens by the Constitution, which is not justified by the police power of the state. The decision in this case is a long and learned discussion of the conflict between the inalienable rights of the citizen and the exercise, or attempted exercise, of the police power by the state.

In *Aikens vs. Wisconsin*, 195 U. S., page 194, this Court drew the line between legitimate competition and malicious mischief. The distinction between hurting another's business by competition, or taking the trade away from another, and securing it for one's self, and the mere *malicious* injury of another's business without any idea of gain for one's self, is clearly drawn.

The decision in that case turned upon the ground that the Supreme Court of Wisconsin had given a particular meaning to the words "malicious injury", and held that they did not mean any injury resulting from an intentional competition, but simply a *wanton* or *malicious* injury inflicted for the sake of the injury and not as a method of *competition* and *gain*.

In that case, Mr. Justice White dissented upon the ground that the Supreme Court of Wisconsin had given to the statute a much narrower meaning than its text import, and that construing the statute as he thought it ought to be, it clearly operated to deprive the citizen of his lawful right to contract, guaranteed by the Fourteenth Amendment to the Federal Constitution.

The statute in that case, so far as material here, reads as follows:

"Any two or more persons who shall combine for the purpose of wilfully and maliciously injuring another in his reputation, trade, business, or profession by any means whatever, etc., shall be guilty of an offense."

There was, of course, in this case the added element of *combination* or *conspiracy* to injure.

In *Adair vs. United States*, 208 U. S., page 161, this Court held that it was not within the power of Congress to pass an act making it an offense for any person, being an employer, to threaten any employe with loss of employment or injuriously discriminate against any employe because of his membership in any labor organization, association, or corporation.

This Court quoted with approval this language from *Cooley on Torts*, page 278:

"It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress."

This general proposition of the right of each individual to exercise his own judgment and discretion without let or hindrance with reference to the sale or disposition of his own property is universally con-

ceded. The question which in recent years has caused much discussion in the Courts is as to the right of two or more persons to combine with reference to the sale or disposition of property, etc.

Of course, in the case at bar, there is no question of *combination or conspiracy*. The act is directed against an individual dealer only. In speaking of the rights of a person to sell his labor, the Court said:

"The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employe to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employe."

And again,

"The employer and the employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

In *Passaic Print Works vs. Ely & Walker Dry Goods Co.*, 105 Fed., page 163, the Circuit Court of Appeals of the Eighth Circuit, said:

"It has been well observed that it would be dangerous to the peace of society to admit the doctrine that any lawful act can be transformed *prima facie* into an actionable wrong by a simple allegation that the act was inspired by malice or ill will, or by an improper motive. It is wiser, therefore, to exclude any inquiry into the motives of men when their actions are lawful, ex-

cept in those cases where it is well established that malice is an essential ingredient of the cause of action, or in those cases where, the act done being wrongful, proof of a bad motive will serve to exaggerate the damages."

The case of *Allgeyer vs. Louisiana*, 165 U. S., page 578, is an interesting discussion of how far the police power may be legitimately exercised with respect to those fundamental and inalienable rights of the citizen.

MONOPOLY.

It was the contention of the Attorney General of South Dakota before the Supreme Court of that state in this case, that it was within the police power of the state to protect the weak against the strong,—weak financially, as well as weak physically or mentally,—and that it was competent for the legislature to draw the line wherever in its wisdom it saw fit to draw it with respect to competition between merchants; that it could declare certain acts unfair competition and prescribe penalties therefor.

The Supreme Court of Nebraska in the *Drayton case*, and the Supreme Court of South Dakota in the present case, have sought to sustain their respective laws, principally upon the theory that what the legislature had in mind to prevent, was *monopoly*. In fact, the Supreme Court of South Dakota goes so far as to say,—

"The object of this law is, not only the protection of the competitor, while this is without question one of the objects the legislature had in

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mind, yet undoubtedly the prime object was the protection of the public against monopoly."

The Court calls attention to the fact that the Constitution of South Dakota, Section 20, Article 17, provides as follows:

"Monopolies and trusts shall never be allowed in this state and no incorporated company, co-partnership or association of persons in this state shall directly or indirectly combine or make any contract with any incorporated company, foreign or domestic; through their stockholders or trustees or assigns of such stockholders, or with any co-partnership or association of persons, or in any manner whatever to fix the prices, limit the production or commodity so as to prevent competition in such prices, production or transportation or to establish excessive prices therefor. The legislature shall pass laws for the enforcement of this section by adequate penalties, and, in the case of incorporated companies, if necessary for that purpose may, as a penalty, declare a forfeiture of their franchises."

It is a singular thing that the Court can see any significance in this constitutional provision with respect to the statute in question. It is impossible, we think, to see any connection between this constitutional provision and the law under consideration. The constitutional provision relates to combinations between two or more persons, partnerships, associations, etc., for certain purposes. The act in question, neither expressly, nor by any possible implications, relates to any such combinations. The constitutional provision expressly refers to monopoly, which has a

reasonably accurate legal meaning. The statute in question nowhere refers to monopoly.

The Supreme Court of South Dakota practically reads into the statute, in addition to the express purpose therein stated, to-wit, "for the purpose of destroying the competition of a 'regular established dealer' ", the still further purpose as follows,—*for the purpose of creating a monopoly in such commodity.*

The Court considers the *express* purpose stated in the statute as merely *incidental or secondary* to the one which it emphasizes, to-wit, *creating a monopoly.*

In the *Nebraska case*, that Court laid down the proposition that no act of the legislature should be held to be violative of any of the provisions of a State or Federal Constitution, if it be "*legally possible to sustain it*," and both the Nebraska Supreme Court and the South Dakota Supreme Court have gone to the very limit of supposition and conjecture to find a ground upon which these acts may be sustained.

It will be noticed that the Supreme Court of South Dakota accepts the *Drayton case* as authority for its position, and in several places adopts the reasoning of the former court without question or comment. Certainly there is much in the opinion of the Court in the present case which is novel in judicial opinions, if not utterly unsound. We call attention to the following:

"The effort to promote and effectuate justice by means of human laws has been a continuous fight against human selfishness, especially hu-

man avarice and greed, a continual effort to protect the *weak* against the *strong*. It is the boast of our law that it protects its *wards* in the full and free enjoyment of their lives, their liberties, and their property; and the cry that is always heard when any law is attacked on constitutional grounds is that it has, in some manner and to some degree wrongfully deprived some one of equal protection in those cherished rights of life, liberty and property."

This idea that laborers, whether union or non-union men, and citizens generally, are, or should be, at least to some extent, treated as "wards" of the government has been advanced, in almost every conceivable form in all the arguments used to sustain the statutes such as those under review in the *Marcus Case, supra*, and the *Adair Case, supra*; and yet it has been uniformly held with reference to all those cases that adult laboring men are not, and cannot fairly be treated as "wards" of the government, and because of their character as such, special legislation enacted with reference to their protection as against the ordinary rights of liberty, property and pursuit of happiness, which every citizen alike is presumed to have.

So far as the general language above quoted in the decision is concerned, it finds no support in any of the well considered cases. And again, such general language as the following taken from the decision will show at a glance how far the Court has wandered from the proper application of even correct principles:

"Men have often been deprived of property, liberty and even life, taken by the strong arm of law as a forfeit, a penalty, for having infringed on the rights of their fellows."

And again,

"Among those things which human experience and the public conscience early recognized as essential and necessary to the highest welfare of all, was the right of free and equal competition in the struggles of life, not the right of freedom to crush one's fellow by force of brute strength or the equal brute force of greater wealth or power, but the right to have brute force, wealth, and power so restrained as to place the weakest, poorest, and lowliest on a free equality before the law, with the strongest, richest and most powerful."

This, we respectfully submit, is mere verbal confusion. It is a good illustration of the all too common argument of epithets. It is in reality merely begging the entire question. By implication, at least, if not by express statement, it would seem to be the opinion of that Court that it is perfectly competent for the legislature to enact laws, in the exercise of the so-called police power, based solely upon a classification of *physical strength* or *weakness*, or of *financial strength* or *weakness*; and evidently the Court conceives it to be the duty of the legislatures of the respective states, not only to secure to each citizen *equal legal rights*, but an *equality* of opportunities. In other words, that it is within the power of the legislature to *equalize opportunities* and *chances* of its citizens in the pursuit of happiness. Constitu-

tions have always been considered as dealing with equality before the law, and not equality of opportunities, of strength, of power, of wealth, ability, etc.

It is somewhat difficult to seriously consider or discuss the language quoted. The Supreme Court of South Dakota recognizes the fact that the statutes of that state, in undertaking to define monopoly, have not included within such definition, any such monopoly as they insist is involved in this particular statute. But they say monopoly is a condition or end which is sought. While the legislature of that state has only undertaken to define monopoly according to the ways or means in which it may be brought about, and although the Constitution of the State of South Dakota clearly defined monopoly as being a combination of two or more persons, etc., yet the Supreme Court says the Constitution was, in fact, aimed at all monopolies, while it only calls particular attention to those monopolies which are acquired through the then prevalent method. We think this is clearly construction "run mad". One thing is absolutely certain, and that is, by no provision of the South Dakota Constitution, or by no provision of any statute of the State of South Dakota prior to 1907, the time when this particular statute was enacted, was there any definition or description of monopoly, except a combination of two or more persons, with reference to fixing prices, limiting production, or controlling trade, etc.

Now it occurs that, in 1907, in the particular statute under consideration, without the term "mono-

poly" being in any way either expressly referred to, or implied, that term is read into the statute by construction, and a *significance given to the term* which, prior to that time, it had never had, either by the provisions of the constitution, or any of the provisions of the code.

The argument of the Supreme Court of South Dakota resolves itself in effect to this. Monopoly is a condition or an end which may be sought. It consists in securing or controlling all or practically all of the trade in a particular state, county, city, village or community. It may be secured in various ways; by combination, or by one person or corporation acting alone.

Monopoly, in whatever form attempted, or however accomplished, is against public policy, and against the provisions of the constitution of South Dakota. The legislature of South Dakota is expressly authorized to legislate with reference to it, and if deemed necessary, to not only prohibit it, but to prohibit any and all of those steps which, it may think naturally tend towards it.

If this reasoning be sound, there certainly could be no objection to legislation prohibiting any person or corporation from investing more than a specified sum in any kind of business, upon the theory that the more capital a person has in his business, the more likely he is to succeed in securing trade, and in crushing out competition and in securing a monopoly, even though it be monopoly of a trade only in a particular locality.

Any such reasoning as this necessarily implies a definition of monopoly entirely at variance with the common understanding of that term. In practical effect, monopolies are exceedingly common. Many milkmen have a practical monopoly of their trade in a particular district, even in the large cities. By acquiring the trade of one-half or two-thirds of the people in a particular neighborhood, they naturally make it unprofitable for others to run their carts in that neighborhood, and thus they are able to secure all, or practically all, of the customers.

Some villages are so small as not to warrant the existence of more than one store, one blacksmith, etc. In such cases, there is a practical monopoly, and as a matter of common experience, traders almost universally are seeking, at least within reasonable bounds, to acquire practical monopolies in their lines of trade, and in many instances, these monopolies are, in fact, secured. Conditions and circumstances justify many, if not all, of these monopolies.

The Supreme Court of South Dakota puts a most exceptional case as typical of all the cases against which it says this law is intended to operate.

"He puts the price of the commodity handled so low, at the point where his victim is in business, as to make it impossible to meet such price except at a loss, and, to offset what loss he suffers at that point, he raises prices at one or more other points."

Here, of course, it is lightly assumed that the raising of prices at other points is a matter of mere whim or caprice, and something with which the or-

dinary conditions of trade have nothing to do. It is assuming something which the statute itself does not imply or require, and that is that the dealer who cuts the price, is so situated financially or otherwise, that he can raise the price at will wherever he wishes. It is in this way that the Court endeavors to spell out of the statute something which injures the public generally, to-wit, monopoly, and, in this way, to justify this legislation upon the ground that it is in the interest of the *general public*, and not in favor *merely of the limited few*, to-wit, the *competitors*.

The Court concedes that, prior to 1907, legislative wisdom had been directed against the creation of monopolies and had sought by its legislation, to keep competition between traders free and unrestricted, but that in that year, it evolved a new law, recognizing, as it says, the fact that monopolies could be secured by *too much competition*, as well as by a restraint voluntarily placed upon competition, and then asks this question: "Are these laws constitutional, as being within the scope of the police powers, or is the state helpless to grapple with and destroy this new evil, *because in so doing it will take from the wrong-doer the full enjoyment of right to life, liberty and property?*" And it answers this question as follows:

"We not only believe it can be upheld upon the above theory, but also that it comes under the scope of proper police regulation as recognized by the authorities, and this, not only because it is intended, and would naturally tend to prevent a wrong to the public, but because we be-

lieve it is inherent in the powers of the state to protect one citizen against "unfair competition" of another citizen, where such "unfair competition" is used as a means to and with the intent to deprive such other of his rightful enjoyment of property or the use thereof. Can it be held that this evil which threatens the very foundations of our economic system, and through it the very foundations of a free government, cannot be reached, for the reason, forsooth, that it interferes with the right of free contract on the part of the individual guilty of the wrongful practice."

Here again is the argument of epithets and the reasoning in a circle. The question with which we are concerned in this case is, what are the rights of the "regular established dealer" and what are the corresponding rights of the defendant. It is begging the question to say that the rights of the "regular established dealer" cannot be permitted to be injured or destroyed by the *wrongful* acts of the plaintiff in error. We are concerned here only with these questions. First, what are the rights of the "regular established dealer", and second, what are the rights of the plaintiff in error? When those are established, no one will contend that the legal rights of one may destroy the legal rights of the other. It frequently happens, however, that the legal rights of one meet the legal rights of the other; but when one is damaged in his property or in his rights by the exercise of the legal rights of another, or the legal use of another's property, then while there may be damage, there is no legal injury.

Throughout the argument of the Supreme Court of South Dakota, there is this constantly recurring argument of so-called legal rights of the "victim", and the *illegal* acts of the wrongdoer. If the Court only should attempt a definition of "unfair competition", instead of assuming that it is something which in its nature is wrongful or actionable, it would immediately find itself in difficulty.

It would also find it difficult, if not impossible, to define "unfair discrimination" as applied to trade by an individual private dealer, with respect to two or more communities. No one community has ever enjoyed the absolute right to purchase goods as cheaply as they may be sold in another community, and except so far as such things might be furnished by so-called public service corporations, we apprehend the state would be powerless to regulate the prices thereof; and yet the court is constantly referring to unfair discrimination as something *inherently* wrong.

According to the statute, it is not wrong at all, no matter to what extent the discrimination may be carried, or how much more one community must pay for an article than another pays for the same article, provided there is not present that intent towards some one or more competitors. There is, as we have before argued, no possible connection between the so-called offense of "unfair discrimination" and "unfair competition". They are separate and distinct, and in no attribute whatever interdependent, except so far as

they are made so by the bare declaration of the legislature.

The South Dakota Supreme Court seems to concede that mere discrimination or competition, considered separately and apart from monopoly, could not be legislated against. It said:

"While those statutes forbid 'combinations and contracts' of certain kinds, they were forbidden, not because 'combinations and contracts' were in themselves subjects for police regulation, but were forbidden merely as they might be used as a method or means of creating a monopoly, *laws against monopolies being within the scope of police regulation*. So it is in the case of the statute before us. Mere 'discrimination' is not the thing aimed at, nor even '*unfair competition*', but the evil sought to be prevented is monopoly, and the legislature is merely condemning that class of 'discrimination and competition' which experience had taught the public tended to bring about monopoly, and which was then being frequently resorted to for that purpose, and had become a public menace."

After discussing at considerable length the alleged wrongful motive of a dealer who is seeking to destroy the competition of another, the Supreme Court of South Dakota said:

"Surely it cannot be successfully contended that the state has not the power to prevent the consummation of such wrongful motive simply because, by so doing, it would *impair the constitutional right* of any person, natural or artificial, to freely contract."

We would not be disposed to criticise mere verbal slips in any statement of an opinion, because it some-

times happens that such slips in statement, while obvious, do not, in fact, mislead the reader or convey a wrong impression. In the present instance, however, it will be noticed that this statement necessarily contains a flat contradiction. In other words, it must necessarily mean just this (and we are confident that the Court so intended it, because the whole decision seems to be founded upon it), to-wit, *the legislature cannot be restrained by any constitutional provision when it conceives that any act or motive of a citizen may be wrongful, and so declares it, in making such act or motive illegal and criminal.*

Even if it were possible to construe the statute in question as one primarily designed to prevent monopolies, then certainly any information or indictment drawn under the statute against any party should clearly allege that he not only sold at one point for less than he was selling the same kind of commodity at another point, and for the purpose of destroying the competition of a "regular established dealer" at the former point, *but also with the intent and for the purpose of himself acquiring a monopoly.* If the act can be sustained only upon the ground that it is for the purpose of preventing monopolies, then certainly the statute ought not to be applied to any case where there was *no intention to acquire a monopoly*; and it certainly is easy to see that many, if not most, of the instances which might arise under this statute, would, in fact, be instances where there would not be any intention to actually acquire a monopoly. A dealer might be desirous of getting rid of the com-

petition of another dealer without getting rid of the competition of all other dealers, and he might be desirous of getting rid of one kind of competition, without getting rid, at the same time, of another kind or other kinds of competition. In other words, it is perfectly easy to conceive of numerous cases where a party might under this statute, be guilty of "unfair competition" and even "unfair discrimination" without, in fact, entertaining any intent of acquiring a monopoly, so that a man under the statute, as construed by the Supreme Court of South Dakota, might in fact, be found guilty of an offense without, in fact, having or entertaining the purpose of acquiring a monopoly, without which, according to the opinion, the statute could not be sustained.

It has always been, what might be termed, a fundamental principle of good pleading, both criminal and civil that it is necessary to specifically allege every ultimate fact which is a necessary and constituent element of the offense charged, or the cause of action attempted to be set up. If, in place of the ultimate facts, the pleader attempts to set up evidentiary facts, *then such evidentiary facts must be alleged as conclusively establish the ultimate facts, otherwise the pleading is not good.*

Under the present Sherman Act, it is now held that only those contracts are held to be within the statute which unreasonably restrain trade. It would hardly be contended at the present day that a pleading, either civil or criminal, under that Act, would be good, which did not allege, either directly or by necessary

implication, an *unreasonable* restraint of trade. It need not be alleged in so many words that the particular Act complained of was in *unreasonable* restraint of trade, but the act or acts set up must, in fact, show that they are in *unreasonable* restraint of trade, or the pleading would certainly not be good.

So in the case at bar. The statute is construed to be directed against monopolies, practically reading into the statute in addition to the words "for the purpose of destroying the competition of another," the further words "and for the purpose of creating or acquiring a monopoly."

The principles involved in this South Dakota act or rather the objections to it, are ably stated in the case of *State vs. Dalton*, 22 R. I., 77. The Court says:

"It—giving trading stamps—is simply one of the infinite variety of devices which are resorted to by trades people in these days of sharp competition to promote the sale of their goods. *** We think it is clear that such a prohibition—of trading stamps—is an unwarranted interference with the individual liberty which is guaranteed to every citizen, both by our State Constitution and also by the Fourteenth Amendment to the Constitution of the United States. *** This unalienable right is entrenched upon and impaired whenever the legislature prohibits a man from carrying on his business in his own way provided, always, of course, that the business and the mode of carrying it on are not injurious to the public, and provided also, that it is not a business which is affected with a public use or interest. *** But it is further argued in support of the statute that the scheme aimed at is one which is demoralizing to legitimate

business, and hence within the police power of the state to prohibit. * * * In this connection it is pertinent to observe that it is not enough to warrant the state in absolutely prohibiting a given business that it is conducted by methods which do not meet with general approval. There must be something in the methods employed which renders it injurious to the public, in order to warrant the state in interfering therewith. Nor is it enough to bring a given business within the prohibitory power of the state that it is so conducted as to seriously interfere with or even destroy the business of others.

Take, for illustration, the great department stores in our large cities. By reason of the almost infinite variety of goods which they carry, they furnish greater facilities to customers and can offer them greater inducements in the way of trade than can those stores which carry but a single line of goods. The result is, that, as everybody knows, very small traders have been crushed out and obliged to abandon their business entirely, while the owners of the mammoth establishments, which supply almost everything which we eat, drink, wear, use, need or desire, whether useful or ornamental, are prosperous and successful to a remarkable degree. But while the result of this method of doing business is injurious to those who employ the more primitive one, can it be said that a law prohibiting a department store would be a valid exercise of police power? Clearly not." * * *

"It may be demoralizing to legitimate business for two rival dry-goods houses to cut prices in the attempt to undersell each other, or for two competing railway lines to sell tickets at half price in the attempt to get an advantage over the other, yet probably no one would claim that such competition could be prohibited by law. 'Bargain Sales' and 'Bargain Counters' may be demoralizing to business, but probably

no one would claim that they can be abolished by law."

The following cases are in point upon this branch of the case:

Loss vs. Rees Printing Co., 41 Neb., 127;
People vs. Marx, 99 N. Y., 377;
Slaughterhouse Cases, 16 Wall., 106;
San Francisco Lumber Co. vs. Bibb, 137 Cal.
Smell vs. Bradbury, 139 Cal., 379;
Ex Parte Quary, 149 Cal., 379;
Republic Iron & Steel Co. vs. State, 160 Ind.,
379;
Cody vs. Dempsey, 86 App. Div. (N. Y.) 335;
State vs. Goodwill, 33 W. Va., 179;
State vs. Fire Creek Coal & Coke Co., 33 W. Va.,
188;
Ex Parte Dickey, 144 Cal., 234;
Leep vs. St. Louis I. M. & S. Ry. Co., 58 Ark., 407;
State vs. Missouri Tile & Lumber Co., 58 Ark.,
536;
State vs. Loomis, 115 Mo., 307;
Commonwealth vs. Perry, 155 Mass., 117;
Codecharles vs. Wigeman, 113 Pa., 431;
Millet vs. People, 117 Ill., 294;
Frorer vs. People, 141 Ill., 171;
Ritchie vs. People, 155 Ill., 98;
In re Jacobs, 98 N. Y., 98;
Block vs. Schwartz, 27 Utah, 387;
Shaver vs. Pennsylvania Co., 71 Fed., 931;
Wright vs. Hart, 182 N. Y., 330;
People vs. Williams, 189 N. W., 131.

The Supreme Court of South Dakota said:

"We not only believe that it can be upheld upon the theory that its purpose and effect is to prevent *the establishment of a monopoly* but also that it comes under the scope of proper police regulation, as recognized by the authorities."

The Supreme Court of Nebraska said:

"If the state has not the power to protect the people from the acts of those who have, for their purpose the destruction of a business of a competitor, in order that the wrongdoer may have a monopoly, its powers are much more limited than we had supposed."

But the word "monopoly" is not even mentioned in either statute. These statutes, when their words are given their plain obvious meaning, do not relate to the *establishment of a monopoly*, nor to an attempt to *establish a monopoly*. The *intention* which imparts criminality to the act of discrimination is not defined as an *intention to create a monopoly*. The discrimination becomes criminal whenever it is indulged in with the intention and purpose of destroying the competition of a *single competitor* in any locality. To attempt to destroy the competition of *one competitor* is not an attempt to *create a monopoly*.

No fair interpretation of these acts can justify the conclusion reached by the South Dakota and Nebraska courts that their purpose was to prevent the destruction of all *competitors*. A dealer in commodities in general use *may have many*, and generally *has more than one* competitor. The destruction of

the business of one competitor would not result in a monopoly of the trade in that locality. In fact, while there may be several competitors in any locality, a business man may, for purely personal reasons, determine to drive out of business a particular competitor and may discriminate in prices between localities for the purpose of driving out that particular competitor, and yet the *creation of a monopoly* in the trade of that particular locality might be entirely foreign to his intent, purpose or desire. In other words, under the plain meaning of the words used in the statute, a merchant may be guilty of the act defined as unfair discrimination, although he had at no time any purpose, intent or desire to create or establish *a monopoly*.

The reasoning of the South Dakota Supreme Court indicates that in passing upon the statute in this case, the Court assumed, entirely without warrant, two things:

1. That the purpose of the legislature in passing the act in question was to prevent the creation of monopolies, and,
2. That the intention specified in the act in question which, with the discrimination, constituted the crime, was the *intention to monopolize the trade of any locality*.

Under the South Dakota Act it is only necessary to allege and prove that the defendant purposes to "*destroy the competition of a regular established dealer*", not competition generally.

The act passed by the legislature attempts to make

discrimination illegal when its purpose is to destroy the competition of a "regular established dealer", but the Supreme Court of South Dakota in upholding the validity of the act has evidently relied upon the thought that the destruction of the competition of a competitor by discrimination, must necessarily be with the purpose of procuring and enjoying a monopoly in the trade.

Thus in this case the Court has based its opinion upon a different statute from that which was passed by the legislature.

At the time of the enactment of this statute, there was already a law in South Dakota defining and punishing trusts and monopolies. Penal Code No. 770 to 781. By these provisions the legislature of the state had made criminal in the most broad and sweeping terms, any attempt to monopolize trade or commerce within the state.

We respectfully submit that, construing this statute according to the plain import of its language, and the natural and reasonable effect of its operation (and this is the true rule—*Minnesota vs. Barber*, 136 U. S. Rep., 313), it is unconstitutional, denying, as it does, to the plaintiff in error the equal protection of the law and depriving it of its property and abridging its right of contract, without due process of law.

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Attorneys for Plaintiff in Error.

EXHIBIT A.

REESE, J. An information was filed in the district court of Antelope county, in which it was charged that the defendant, the agent of the Atlas Elevator Company, a corporation, incorporated under the laws of the State of West Virginia, and doing business in this state and engaged in the sale and distribution of lumber, lime, plaster, cement, and brick, commodities in general use in the Village of Orchard, in Antelope county, and in the village of Brunswick, in the same county, on the 20th day of August, 1907, in the county and state aforesaid, "did unlawfully, maliciously, and intentionally, for the purpose of destroying the business of a competitor in the village of Orchard, in Antelope county, in the State of Nebraska, discriminate between different sections of the State of Nebraska, to-wit, the village of Brunswick, in Antelope county, in the State of Nebraska, and the village of Orchard, in Antelope county, in the State of Nebraska, by selling such lumber, lime, plaster, cement, and brick at a lower rate in the village of Orchard, in said state and county, than is charged by the Atlas Elevator Company for lumber, lime, plaster, cement, and brick in the village of Brunswick in said county and state, after making due allowance for the difference in the grade quality and the actual cost of transportation from the point of production of said lumber, lime, plaster, cement, and brick, contrary to the form of the statute in such case made and provided, and against the peace and

dignity of the State of Nebraska." The defendant filed his motion to quash the information, alleging the following reasons and grounds therefor:

"First. Because the legislative enactment by the legislature of the State of Nebraska, under which the said information was filed, contravenes the provisions of the Constitution of the United States of America.

"Second. Because the legislative enactment contravenes the provisions of the Constitution of the State of Nebraska, and that such enactment is unconstitutional and void.

"Third. Because the facts stated in the information are not sufficient to constitute an offense under the laws of the State of Nebraska."

The District Court sustained the motion, following the order with the recital that: "It appearing to the Court that no valid information can be filed against the defendant under the statute and laws of the state, under which information was filed, it is ordered that the defendant be discharged and his bail released." The county attorney excepted to the ruling and order of the Court, and brings the case to this Court for review under the provisions of Sections 483 and 515 of the Criminal Code.

There is no attack made upon the form of the information in the briefs of contending parties, and nothing was said upon the subject in the oral arguments; hence no reference will here be made to it. The whole contention is as to the constitutionality of the act of April 3, 1907, published as Chapter 157,

p. 490, Sess. Laws 1907. The act is too long to be copied here in full, and we must be content with a reproduction of the first section, which is as follows: "Section 1. (Local Unfair Discriminations.) Any person, firm, company, association or corporation, foreign or domestic, doing business in the State of Nebraska and engaged in the production, manufacture or distribution of any commodity in general use, that shall intentionally, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities or cities of this state, by selling such commodity at a lower rate in one section, community or city, than is charged for said commodity by said party in another section, community or city, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of production, if a raw product, or from a point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful." The other sections prescribe the penalties for a violation of the law and the methods of its enforcement; but which we need not here notice. We have been favored with able oral arguments at the bar of the Court as well as very elaborate briefs, in which a multitude of cases are cited, and with a full discussion of the legal principles contended for, but which it will be impossible for use to refer to in detail without extending this opinion to an unreasonable length. As we understand the contention of counsel for defend-

ant, it may be fairly summarized by the following extract from their brief: "A careful examination of the act reveals that it is directed against persons or corporations doing business in the state and engaged in the production, manufacture, or distribution of 'any commodity in general use'; against persons or corporations dealing in commodities which, until the passage of the act, had universally, and ever since mankind began to trade had been, regarded as subjects of legitimate and unrestrained commerce and private enterprise. The act is not directed against dangers to the public health or morals. The act is not directed against so-called natural monopolies or business affected with a public interest. The act attacks trading in commodities in general use. It is the converse of an anti-trust law in being an anti-competition law." The argument is that the object and purpose of the act are not within the police power of the state; that its effects would be to stifle competition and thus foster monopolies; that it takes from the citizen the right to contract and to control his property, destroys freedom in trade, and practically compels the merchant and tradesman to conduct and carry on his business at one place only; that it is class legislation, and "operates upon and against the man who has stores in more than one place, and does not affect the dealer in but one place." It is said that: "The fundamental error in the act is that it attempts to inquire into a man's intentions with reference to something that is his own private concern, just as much as his religion or polities. Deal-

ing in commodities in general use is something with which the police power of the state has nothing whatever to do. The citizen is a free man, and is the keeper of his own heart and mind." It is contended that the act is violative of the fourteenth amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law, and that no person shall be denied the equal protection of the laws, and that the similar provision in the Constitution of this state is also violated by this act. Many cases are cited by which it is sought to maintain this contention; but, in the view which we take of the law, we are not able to see that they can be applied. They refer, in the main, to the statutes which seek to control and limit transactions in the ordinary and lawful commerce of the country, such as the issuance of trading stamps, the conferring of presents or gratuities out of one's own property for the purpose of drawing custom, the right of the individual to engage in any line of lawful business he may see proper to follow; that acts which discriminate in favor of one as against another class of persons engaged in the same lawful business are infractions of the Constitution, and therefore void, as well as acts declaring specified transactions unlawful, but exempting from their provisions certain named classes of persons and lines of business; the maintaining by mining or manufacturing companies of stores, truck shops, etc., by which they sell their goods and wares to their employes on credit at a higher price than is

charged other customers who buy for cash; that classifications of persons or things must be general, and apply to all similarly situated; acts which seek to destroy the right of every competitor to fix his own price upon commodities which he may lawfully sell, or money which he may lawfully loan (subject of course to usury laws), and, in general, such acts as seek to invade the reserved right of every individual to transact and carry on his lawful business according to his own judgment, in his own way, untrammelled by discriminatory laws, by which others similarly situated are given preferences over him. In the foregoing we have sought to fairly outline the contention of the defendant, giving in this limited way the substance of the holdings of the cases cited without further reference to them.

At the beginning of our investigations we are confronted with the oft-repeated and well-settled doctrine that no act of the law-making power of the state can be held unconstitutional unless it is clearly violative of the provisions of the Constitution; that, if it is legally possible to sustain legislative enactments, they should not be held void. We are further met with another well-known rule that what is known as the police power is inherent in every government, and does not depend upon legislative grants or limitations. Then unless the act under consideration is open to attack as in violation of the written provisions of the fundamental law, or an illegal effort to extend the police power over a subject which cannot be brought within the rightful exercise of that pow-

er, the law must be sustained. It must also be remembered that with reference to the latter subject the legislative department of the state, within well-known and well-defined limitations, is the sole judge as to when and how that power is to be exercised. From a careful reading and study of the act in question, we are driven to the conclusions that it is not subject to attack upon either of the grounds named. It does not seek to prevent any person or corporation from engaging in any lawful business, nor does it prevent legitimate competition, nor seek to interfere in any way with the due management of anyone's business, nor prevent the sale of any commodity at any price which the owner may fix or demand. Indeed, the act recognizes the right of all to engage in the production, manufacture, distribution, and sale of any and all commodities in general use. There is a clear recognition in law, in commerce, and in the possession and use of property that every person has the right to use his own as he sees fit, so long as he does not wrongfully use it in such a way as to interfere with the rights of others. The whole fabric of civilized, social, and commercial life, and the enjoyment and ownership of liberty and property, is based upon compromises and limitations of the use of one's members and the control of his property. The act in question only provides against the use and sale of one's property for the purpose of destroying the business of a competitor. The owner or dealer may sell for any price he may choose, on any terms he may adopt, without reference to what effect his action may

have upon the trade or business of others, so long as he does not do so for the purpose named. It may be that by underselling others he may draw trade away from them, or, indeed, the secondary effect may be to compel them to adopt his scale of prices or abandon their business, yet, if his conduct is not for the purpose and with the intention prohibited by the statute, he is violating no law, and no one can legally object to or interfere with his methods. The statute clearly makes the purpose with which the act is done the controlling element of the offense. As claimed by counsel for the state, the statute under consideration was enacted for the purpose of supplying a defect in the anti-trust laws of the state. It is within the knowledge of all that in many instances persons engaged in the sale of commodities in general use by the people have depressed prices in one locality where there was competition and increased them in others where there was none, thus avoiding loss until the competitor was driven out of business, when prices would be raised to an unreasonable and oppressive extent and the people of the district or community supplied from that point would be the sufferers. It was evidently the intention of the legislature to prevent that course of conduct if resorted to for that purpose. The law afforded no protection from the injurious effects of such predatory course. If no protection could be furnished to the people who were compelled to purchase the commodities, it would be easily within the range of possibilities for one person or corporation to practically control the whole commerce

of a community, a county, or even the state, exacting such prices as greed might dictate, and yet seeing to it that no others should be allowed to engage in a similar business as competitors. It is within the knowledge of all of mature years that within the last quarter or half century the meats furnished the people of our cities and towns were supplied by local dealers who purchased their live stock from the nearby farmer or stock grower, slaughtered the animals, and supplied wholesome meats at reasonable prices, and yet paid remunerative prices for the live animals, saving the cost of transportation to and from what are now the exclusive points of manufacture and production. That both the producers and consumers are losers is known to all. That this condition has been brought about by a system of coercion and underselling "for the purpose of destroying the business" of local competitors is also known to all. Is there no power anywhere lodged in the state to prevent this or remedy the evil? If there is, it is with the lawmaking power. If that department of government has the power, it must be by the exercise of the rights of police regulation. Has the legislature that power?

Many writers have sought to define and prescribe the true extent and limitations of the police power, but none have succeeded to the approval and satisfaction of all. It must be conceded that in its operation there is no distinction between persons natural or corporate. *Fertilizing Co. v. Hyde Park*, 70 Ill. 642. In *Tiedeman's Limitations of Police Power*, 1, it

is said: "The object of government is to impose that degree of restraint upon human actions which is necessary to the uniform and reasonable conservation and enjoyment of private rights. Government and municipal law protect and develop, rather than create, private rights. The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them. It involves a provision of means for enforcing the legal maxim, which enunciates the fundamental rule of both the human and natural law, '*Sic utere tuo ut alienum non laedas.*' The power of the government to impose this restraint is called 'police power.' By this 'general police power of the state, persons, and property too, are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the legislature to do which no question ever was or upon acknowledged general principles ever can be made, so far as natural persons are concerned.' " In 22 *Am. & Eng. Enc. of Law*, 915, it is said: "It has been found impossible to frame, and is indeed deemed inadvisable to attempt to frame, any definition of the police power which shall absolutely indicate its limits by including everything to which it may extend and excluding everything to which it cannot extend, the courts considering it better to decide as each case arises whether the police power extends thereto. There have been, however, many attempts to define

this power in a general way, and the sum of these definitions amounts to this: That the police power in its broadest acceptation means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and establish such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest. * * The police power is an attribute of sovereignty, and exists without any reservation in the Constitution, being founded upon the duty of the state to protect its citizens and provide for the safety and good order of society. It corresponds to the right of self-preservation in the individual, and is an essential element in all orderly governments, because necessary to the proper maintenance of the government and the general welfare of the community. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property, and it has been said to be the very foundation upon which our social system rests. It is founded largely on the maximum '*Sic utere tuo ut alienum non laedas*,' and also to some extent upon that other maxim of public policy, '*Salus populi suprema lex*.' "

It is true that the ultimate question of the validity of a statutory enactment, by which this power is sought to be exercised, is with the courts, and they will not hesitate to discharge the duty of declaring

an act void if clearly so convinced, but subject to the presumptions and limitations herein referred to. The rule upon this subject can perhaps be no more clearly expressed by us than by the following: "Under the police power the state can interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. But the character of police regulations, whether reasonable, impartial, and consistent with the Constitution and the state policy, is a question for the courts, for the police power is too vague, indeterminate, and dangerous to be left without control, and hence the courts have ever interfered to correct an unreasonable exertion or a mistaken application of it; and, when the legislature passes an act which plainly transcends the limits of the police power of the state, it is the duty of the judiciary to pronounce its invalidity and to nullify the legislative attempt to invade the citizen's right, for to hold that every act of the General Assembly passed under the guise of an exercise of the police power or sought to be defended upon that ground was beyond judicial control would render every guaranty of personal right found in the Constitution of little or no value." The legislature, as we must conclusively presume, acted upon the fullest investigation, and upon what appeared to it to be reasonable grounds, and, as must be also assumed, has determined that the prohibition of the reduction

of the price of commodities in general use in any particular locality "for the purpose of destroying the business of a competitor in such locality" and discriminating "between different sections, communities, or cities" by underselling at the point of competition for the purpose named would be conducive to "the general welfare" of the people compelled to purchase such commodities, and by the act in question has sought to remedy the evil. Has it not the power to do so? As said in *Yick Wo v. Hopkins*, 118 U. S. 370, 6 Sup. Ct. 1064, 30 L. Ed. 220, and quoted in *Powell v. Pennsylvania*, 127 U. S. 685, 8 Sup. Ct. 996, 1257, 32 L. Ed. 253: "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." If the state has not the power to protect its people from the acts of those who have for their "purpose" the destruction of the business of a competitor in order that the wrongdoer may have a monopoly, its powers are much more limited than we had supposed. In *Powell v. Pennsylvania*, *supra*, the court quoting from the Sinking Fund cases, 99 U. S. 700, 25 L. Ed. 496, said: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of the other without danger. The safety of our institutions depends in no small degree on a strict observance of

this salutary rule. * * * The power which the Legislature has to promote the general welfare is very great, and the discretion which that department of the government has in the employment of means to that end is very large." *Waters-Pierce Oil Co. v. Texas*, 19 Tex. Civ. App. 1, 44 S. W. 936, is an instructive and well-considered case upon the general subject involved in this case. When we take into consideration that it is not the act itself, but the act coupled with the purpose of destroying the business and property of others, which is declared to be criminal, we find but little trouble in arriving at the conclusion that the statute is within the power of the Legislature, and is therefore valid.

It is contended by counsel for defendant that "the act interferes with freedom of contract," and is therefore violative of the Constitutions of both the Federal and State governments. As we have already indicated, we are wholly unable to see where the previously existing right of the individual to enter into lawful contracts is in the least abridged or impaired. It is not the making of contracts which is forbidden, but the conduct, purpose, and motives of the party in connection with his acts which brings him within the prohibitions of the law.

It is also contended that the act is void by reason of its classifications, and must therefore be held invalid on the ground of "class legislation." It is said that "the act operates upon and against the man who has stores in more than one place, and does not affect the dealer in but one place." That "keepers

of but one store may compete, intend to build themselves upon the ruins of their fellows who maintain single stores or stores in several places, and to ruin their fellows in order to build themselves up, and the law applauds; but keepers of more than one store doing the very things and with like intentions as single store keepers are frowned upon, fined, and imprisoned." To this we must be permitted to say that we are unable to find any provision in the act which is susceptible of the construction contended for. An individual or corporation may have but one place where the commodity dealt in may be stored or kept in stock, and yet in the "distribution" of that stock may seek to destroy the business of a competitor in another locality and thus violate the law. There are many cities and villages in this state which are adjacent to each other—sometimes so near as to cause a stranger, unacquainted with their superficial boundaries, to be unable to say where one leaves off and another begins. A dealer in one may, for the purpose of destroying the business of a competitor in the other, so discriminate as between the two places as to violate the statute. Common experience and observation, within the knowledge of all, is to the effect that many of the strongest and most grasping monopolies of the state have their places of business—their business homes—in but one place, and yet they are "distributing" and "selling" their commodities in practically every city and village within the state. They do not desire competition. They do not hesitate to destroy the business of local dealers

wherever found by unjust discriminations, prompted by that "purpose", the law is violated, as it is within the power of the Legislature to prevent the discrimination. Again, it is said that by the provisions of the law an act which is of itself lawful may be rendered unlawful by reason of the mind or purpose of the individual accused, and that such mental condition or purpose would be impossible of proof. This is not a question which inheres in the subject before us. The presence or absence of a criminal purpose may or may not be easily ascertained, but we hold that we now have nothing to do. Each prosecution under the act will have to depend upon its own proven facts. The existence, or non-existence of what is known in criminal law as the criminal mind, would be a question for a trial jury under the facts established by the evidence submitted. Questions of this kind are discussed in the brief of defendant which we have incidentally referred to, but without special attention, and which we scarcely think merit a further discussion in view of the tension of this opinion.

We find nothing in the act under consideration requiring us to hold it unconstitutional. The district court erred in holding the act of the Legislature invalid. The exceptions of the state are therefore sustained. Judgment accordingly.

ADDITIONAL AUTHORITIES UPON CLASSIFICATION:

State vs. Parr, 109 Minn., 147;
State vs. Ramage, 109 Minn., 302;
State vs. Wagener, 69 Minn., 206;
Kelleyville Coal Co. vs. Harrier, 69 N. E., 927 (Ill.)
State vs. Walsh, 136 Mo., 400;
State vs. Miksiceek, 225 Mo., 561;
Gillespie vs. People, 188 Ill., 176;
Toledo Ry. Co. vs. Long, 82 N. E., 757 (Ind.)
State vs. Nashville Ry. Co., 135 S. W. 773 (Tenn.)
In re Grice, 79 Fed., 627;
State vs. Loomis, 115 Mo., 307;
City of Louisville vs. Weikel, et al., 127 S. W. 147;
Harding vs. The People, 160 Ill., 459.

Supreme Court of the United States

OCTOBER TERM, 1911

No. 276

CENTRAL LUMBER COMPANY, (A corporation)

Plaintiff in Error

VS.

STATE OF SOUTH DAKOTA

Defendant in Error

**In Error to the Supreme Court of the State of South
Dakota**

Brief for Defendant in Error

BRIEF OF ARGUMENT

In determining whether or not the Supreme Court of the State of South Dakota erred in its decision, we think it proper that this Court should have before it the case as presented to that Court; and we will therefore set out such portions of the argument had before that Court, as will clearly give to this Court an understanding of the contention of both parties there.

As the case was presented to the Supreme Court of South Dakota, many points and objections against the statute were urged and considered, which have apparently now been abandoned by the plaintiff in error.

This will also clearly appear from the full opinion of the Supreme Court of the State of South Dakota, set out on pages 17 to 37 inclusive, of the transcript of record herein.

Notwithstanding the abandonment of these several points, we believe this Court will desire to be advised as to the position of the respective parties in the presentation of this matter to that Court, and it may be an aid to a correct understanding of the opinion of that Court, and we have consequently inserted in our brief to this Court some of the points and objections which were urged against the statute there, and which have been practically abandoned here.

THE PURPOSE OF THE ACT.

We desire to call the attention of the Court to conditions known to exist at the time of the passage of this act and which will be taken into consideration for the purpose of determining the evil that was aimed at and the wrongs that the legislature sought to remedy by this legislation.

It may be of interest to review the history of this class of legislation. This act is one step only in the long line of edicts, decrees and statutory enact-

ments that have had for their object, since the organization of governments, the protection of the weak against the oppression of the strong. It matters not who the weak are. It matters not whether they are weak physically or financially. Governments were organized and they exist for the protection of the weak against the oppression of the strong, by the great body of society. If this cannot be done, then government is farcical, for it would restrain the weak from protecting themselves by primitive means, as best they may; yet lends no aid through its own agency. If we confess that organized society is unable to check the constant aggressions of the more fortunate against the less fortunate, then the very ones we should protect are more helpless than if there were no pretense of protection. Before governments were known the only oppression was by the physically strong against the physically weak. This was checked by the institution of government with its tenet that he who wronged the individual committed an offense against all.

But with the check of this sort of oppression, and as an outgrowth of the system that permitted the individual to keep that which he had earned, came another form of oppression—that of the financially strong against the financially weak. He who had been permitted to and did accumulate large wealth, whether by superior skill, cunning or industry, used it to buy up all of a commodity and then oppress his fellows by taking advantage of their necessities and exacting unconscionable profits.

This sort of oppression is not altogether modern. Monopolies may not have been defined as such until recently, when the art began to be practiced by aggregated corporate interests, but the theory was evolved long before republics were dreamed of.

Prof. Beach, in introducing his work on Monopolies and Industrial Trusts, uses this language:

"Before Greece and Rome, Solomon said: 'He that withholdeth corn, the people shall curse him, but blessing shall be upon the head of him that selleth it.' It is apparent that even at this early day the thrifty Hebrew was familiar wth the modern devices for increasing the price of bread, and it is equally apparent that, in the execution of schemes of this character, he was regarded both by his countrymen and by the great monarch, with little favor. The motives which prompt to devices of this character have their springs in that corrupt inclination of human nature, under which men, in all ages, have sought to advance their own pecuniary interests by taking advantage of the necessities of their fellows. But while the motives and the ends sought in schemes of this character are not original with modern financiers, the capitalists of the later decades of the nineteenth century have outstripped all the generations of the past in devising new methods for the accomplishment of their purposes. And while their capacity in this direction may be of a higher order than that of the great financiers of earlier periods, the degree of their success is at-

tributable, doubtless, to the industrial conditions which are peculiar to the present age. What they have accomplished would not have been possible at any earlier period."

Governments have striven to check this form of oppression as sedulously as they sought to check the oppression of the physically strong over the physically weak. It is the old story of human avarice and greed that centuries of civilization have failed to remove. And here it may be pertinent to say—that if it is wrong for society to permit a strong man, physically, to force a weak man, physically, to surrender his substance by show of force, then it is equally wrong for society to permit a man to take advantage of conditions he has himself brought about by his accumulated wealth and wrest arbitrary and unconscionable profits from his less fortunate brothers.

This has long been recognized, and governments have early taken steps to declare such oppression as only another species of robbery, and have prohibited such practice and provided penalties therefor.

The Emperor Zeno, as early as A. D. 483, promulgated this edict:

"We command that no one may presume to exercise a monopoly of any kind of clothing, or of fish, or of any other thing serving for food, or for any other use, whatever its nature may be, either of his own authority, or under a rescript of an emperor already procured, or that may hereafter be procured, or under an imperial decree or under a rescript sign-

ed by Our Majesty; nor may any persons combine or agree in unlawful meetings, that different kinds of merchandise may not be sold at a less price than they may have agreed upon among themselves. Workmen and contractors for buildings, and all who practice other professions, and contractors for baths, are entirely prohibited from agreeing together that no one may complete a work contracted for by another, or that a person may prevent one who has contracted for a work from finishing it; full liberty is given to any one to finish a work begun and abandoned by another without apprehension of loss, and to denounce all acts of this kind without fear and without costs, and if any one shall presume to practice a monopoly, let his property be forfeited and himself condemned to perpetual exile. And in regard to the principals of other professions, if they shall venture in the future to fix a price upon their merchandise, and to bind themselves by agreements not to sell at a lower price, let them be condemned to pay forty pounds of gold. Your court shall be condemned to pay fifty pounds of gold if it shall happen, through avarice, negligence, or any other misconduct, the provisions of this salutary constitution for the prohibition of monopolies and agreements among the different bodies of merchants, shall not be carried into effect."

England followed with similar prohibitions under Edward VI, by "An Act against Regrators, Fore-stallers and Ingrossers."

Beach on Monopolies and Trusts, Sec. 4.

At common law we find contracts and agreements in restraint of trade held to be contrary to the public policy, and void.

A single citation will suffice.

Central Ohio Salt Co. vs. Guthrie, 35 Ohio State 666.

Early in the history of our country, statutes were enacted by the several states forbidding such practices and fixing penalties therefor. At this time we think there is no state in the Union but has some statutory provision of this character; and in 1890 congress, deeming this evil of great national concern and danger, passed its anti-trust act.

As showing the views of the United States supreme court upon this system, we call attention to the opinion of Justice Peckham in

U. S. vs. Trans. Missouri Freight Asso., 166 U. S. 290.

We have said that the act now under consideration is but one step in the progress that has been made to check the oppression that results from either a monopoly or a trust. So far as the history of this legislation goes, in our state, it began with Chap. 154 of the Session laws of 1890 which was followed by the act of 1893 (Chap. 171, Session Laws, 1893.)

The foregoing statutory provisions proving inadequate to curb the growing evils, and the then constitution of the State of South Dakota being

deemed insufficient to support more efficient legislation along these lines, an amendment to the constitution was proposed at the legislative session of 1895, and was submitted to the electors of the State at the general election held in 1896, and was passed and adopted by vote of 36,763 for, and 9,136 against, and it became Section 20 of Article 17 of the Constitution of the State of South Dakota, and is as follows:

“Monopolies and trusts shall never be allowed in this State, and no incorporated company, co-partnership or association of persons in this State shall directly or indirectly combine or make any contract with any incorporated company, foreign or domestic, through their stockholders or the trustees or assigns of such stockholders, or with any co-partnership or association of persons, or in any manner whatever to fix the prices, limit the production or regulate the transportation of any product or commodity so as to prevent competition in such prices, production or transportation, or to establish excessive prices therefor.

The legislature shall pass laws for the enforcement of this section by adequate penalties and in the case of incorporated companies, if necessary for that purpose, may as a penalty, declare a forfeiture of their franchises.”

The adoption of this amendment was followed by the legislative act of 1897 (Chapter 94, Session Laws of 1897), which was directed at that parti-

cular form of monopolies created by combinations. Still the doors were not closed to monopoly, as many monopolies were acquired without any combination, and the necessity for the passage of the act of 1907 became apparent. This is the act under consideration here.

The several legislative acts and the constitutional amendment are all directed to the one object—that of preventing one person, or one set of persons, from obtaining a monopoly on a commodity in general use in this state.

The first form of monopoly that occupied legislative notice in this state was the agreement between the several dealers in a commodity to maintain a fixed standard of prices and divide equally the profits. This convenient method of extracting large profits from the consumer became so common and notorious that the acts of 1890 and 1893, and later the constitutional declaration of 1896, with the subsequent act of 1897, found expression. These acts took particular cognizance of the means then commonly employed to effect a monopoly and did not anticipate what other means might afterwards be adopted to circumvent the purpose of the law and bring about the same monopoly by different methods. Under the then law it was no longer possible for a separate organization to make the "gentlemen's agreement" as to prices and division of profits. Hence some other method of evasion must be adopted. This other method was found and proved equally as successful as

the then prohibited one. This became commonly known as the "freezing out process." A large corporation was formed, a large number of plants or yards were located, and the chosen field was rid of competitors by underselling at one point at a time, until each victim was frozen out, when prices would be restored to such figures as seemed desirable to the large concern. The temporary loss of profits at one point, while of vital concern to the lone competitor, was of no significance to the larger concern; for when the competition was gone prices would be readjusted, not only to make such per cent as the large concern deemed itself entitled to, but also to make up for loss of this per cent while the surgical operation was going on. Or, if the field was clear except at the one point, prices would be advanced all over the territory in sufficient degree to balance the temporary loss at that point, and the lone competitor was killed with no loss at all to the aggressor.

This simple system proved very successful, and the wreck of the independent dealer became such a certainty that no one dared to enter a field when once it became known that the large concern desired to occupy it.

The monopoly thus created was just as absolute and just as oppressive as the contracts and agreements to maintain fixed prices that were made unlawful by the earlier anti-trust acts.

And this was the condition that confronted the people in 1907, and that resulted in the passage by

the legislature of Chap. 131 of the Session Laws of that year. This was the evil that was aimed at. This was the wrong that was sought to be remedied.

If we still admit that monopolies are wrong, as has been admitted since the days of Solomon; if we still admit that governments have the right to prohibit this wrong, as has been admitted since the days of Zeno, if we still admit that the state, under its police power, has the right to check monopoly, within its borders, then we must admit that legislation **at least of the character** of Chap. 131 of the Session Laws of 1907, is valid and constitutional, because its only object, purpose and effect, is to check and prevent monopoly.

Taking a situation as illustrated by the case at bar—a large corporation, operating lumber yards in some thirty towns of northern South Dakota, southern North Dakota and western Minnesota, finds a competitor owning and operating a single yard in a town that it desires to occupy. What does the large concern do? It enters the town, puts prices down to cost, or below, if necessary there, slightly raises its prices in its twenty-nine other yards, and calmly watches the futile struggles of its victim. There is no loss to the large concern. But the smaller competitor is destroyed. It is only a question of time until he, with the entire loss of his former fair and legitimate profit, must surrender and sell his yard to the other at such price as the other sees fit to give, or move it away to a field that the other does not care

to enter. Then, with the competition gone and the field clear, prices are restored, not only to a figure where a legitimate profit may be assured, but to such extent of profit as the greed and avarice of the larger concern may dictate.

No matter what prices are exacted—no independent dealer dares to enter the field, for he knows what will happen to him; and the only disturbance that may come to the large corporation, is in the event that one still larger and stronger may covet its business and apply the same process to get it. Surely such practices are unconscionable as between dealers, and surely the condition that ultimately results is intolerable to the people at large.

Monopolies are odious, however accomplished, and as fast as human cunning and ingenuity invents a new method to circumvent the laws and acquire a monopoly, just as active must legislation follow to prevent it.

As to the Rule of Construction.

By following the history of this legislation in our state, we find that a step has been taken at five different sessions, in addition to the constitutional amendment of 1896, beginning with the first act of 1890, and ending with the anti-discrimination act of 1907. These several acts, together with the constitutional amendment, are in **pari materia** and must be construed together.

Bishop lays down the rule as follows:

"All its parts, and all acts, though made at different times or even expired, or repealed, and the entire system of laws, and the common law touching the same matter, must be taken together; and if one part standing by itself is obscure, it may be aided by another which is clear."

And again,

"The interpreter should consider and take into account what was the law before, which Coke says is 'the very lock and key set to open the windows of the statute,' the mischief against which the law did not provide; the nature of the remedy proposed and the true reason of the remedy. It has been said that we may learn the mischief from our knowledge of the state of the law at the time, and of the practical grievances generally complained of."

Bishop on Statutory Crimes, Sec. 82, p. 77 (3d Ed.)

This principle is well illustrated and made applicable to the case at bar by Judge Letton of the Nebraska supreme court. We quote from his opinion at some length:

"We think it clear that the whole series of statutes directed against combinations and monopolies should be considered as parts of a connected system, and that no one act should be singled out for construction and be considered apart from the general trend of legislation upon the subject. Statutes in pari materia are to be construed together, and repeals by implication are not favored. The courts

will regard all statutes upon the same general subject-matter as part of one system, and later statutes should be construed as supplementary or complementary to those preceding them. They are to fill up the gaps left by former attempts to mend the evil. It has been said: 'In the course of the entire legislative dealing with the subject we are to discover the progressive development of a uniform and consistent design, or else a continued modification and adaption of the original design, to apply it to changing conditions and circumstances. In the passage of each act the legislative body must be supposed to have had in mind and in contemplation the existing legislation on the same subject and to have shaped its new enactment with reference thereto.' Black on Interpretation of Laws, p. 204. The rule is that all statutes in pari materia must be taken together and construed as if they were one enactment."

State vs. Omaha Elevator Co., 75 Neb. 637
(106 N. W. 979,983).

See also Yakel vs. State, 17 S. W. 943, and
Pollits vs. Wabash Ry. Co., 167 Fed. 158.

While we believe that the 1907 act, standing alone, and measured by the rule of strict construction, would meet the test, yet its purpose and object may be more readily perceived, and its true interpretation more readily had, if we bear in mind the above principle.

Some of the states, foreseeing that discrimination

might be resorted to by those seeking a monopoly, incorporated an anti-discrimination clause in the body of the anti-trust act, as for example, Texas.

Other states more slowly perceived this evasive device and were obliged to supply the defect with a later enactment.

Chap. 258, Laws of 1907, N. D.

Chap. 162, Laws of 1905, Neb.

Chap. 2, Laws of 1905, Kan.

Chap. 329, Laws of 1905, Mich.

Chap. 36, Laws of 1907, Tenn.

P. 750 Session Laws of 1907 and 1908, Oklahoma.

Chap. 169, Laws of 1905, Iowa.

Chap. 269, Laws of 1907, Minn.

Chap. 222, Laws of 1907, Iowa.

Chap. 468, Laws of 1909, Minn.

But though passed at different times, these are held and construed **as a part of the anti-trust or anti-monopoly laws.**

State vs. Drayton, 82 Neb. 254, 117 N. W. 768.

Sec. 770 of the Penal Code of our state provides that:

"A monopoly is a combination of capital or skill, by two or more persons * * * ; first, to create or carry out restrictions in trade * * * ; to prevent competition in the manufacture, transportation, sale or purchase of merchandise, etc. ;

It may be contended that this defendant corporation, constituting a single legal entity, cannot alone

bring about a monopoly, within the meaning of the above act; but the courts do not so hold.

Ford et al. vs. Chicago Milk Shippers Ass'n,
155 Ill. 166, 39 N. E. 651.

Under new conditions and by new devices, the anti-trust laws, as they stood prior to 1907, were ineffective to accomplish their full object in the state. With the 1907 act as an addition thereto, and forming a part thereof, the new conditions, devices and subterfuges were met.

LEGISLATION PROHIBITING UNFAIR COMPETITION AND DISCRIMINATION IS NOT CONFINED TO THE STATES OF SOUTH DAKOTA AND NEBRASKA ALONE.

Counsel, for plaintiff in error, are mistaken in their alleged belief that Nebraska and South Dakota are the only States which have passed acts of like import, and that the decision of the Supreme Court of Nebraska, in the case of State vs. Drayton, 82 Neb. 254, 117 N. W. Rep. 768, and of the Supreme Court of South Dakota in the present case, are the only ones which have ever been rendered, directly passing upon the questions here involved, as an examination of the statutes of the states hereinbefore set out will show that quite a number of the states have laws not only of like import, but almost identical in context, and that the Supreme Courts of several of those states have passed upon the constitutionality of such statutes, and have invariably upheld them.

Chapter 269, Laws of 1907 of Minnesota, is entitled: "An act to prohibit unfair discrimination between different sections, communities or localities, unfair competition, and providing penalties therefor." And Section 1 of the act is as follows:

"Any person, firm, company, association or corporation, foreign, or domestic, doing business in the state of Minnesota and engaged in the production, manufacture, or distribution of petroleum or any of its products, that shall intentionally, or otherwise, for the purpose of destroying the business of a competitor, or creating a monopoly in any locality, discriminate between different sections, communities or cities of this state, by selling such commodity at a lower rate in one section, community, or city than is charged for such commodity by said party in another section, community or city after making due allowance for the difference, if any, in the test or quality and in the actual cost of transportation from the point of production, if a raw product, or from the point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful."

This act was challenged upon the same grounds now urged here, and the Supreme Court of Minnesota held it to be a valid police regulation and constitutional.

State vs. Standard Oil Co., 126 N. W. Rep. 527.

The same state of Minnesota, in 1909, passed a similar act, being Chapter 468, Laws of 1909, and being: "An Act to prevent unlawful discrimination in the sale of milk, cream, butter fat and to provide

a punishment for the same." And the import of that act is almost identical with the act at bar, and it was held constitutional by the Supreme Court of Minnesota, in the case of State vs. Bridgemen & Russell Co., 134 N. W. Rep. 496.

Chapter 222 of the Acts of the 33rd General Assembly of the State of Iowa, amending Code Supp. 1907, Sec. 5028b. is entitled: "An act to amend the laws, as it appears in Sec. 5028b. of the supplement to the Code of 1907, relating to unfair discrimination between different sections, communities, or localities, defining the same, and providing penalties for persons found guilty thereof."

As it will appear from the title of this act, this is also an act of like import to the act under consideration here; and the same objections were urged as to its constitutionality, before the Supreme Court of the State of Iowa, as was urged against this act, and that Court held the act to be invulnerable as against such attack, and in favor of the constitutionality of the law in all its phases.

State vs. Fairmont Creamery Co. 133 N. W. Rep. 895.

A NEW POINT PRESENTED BY PLAINTIFF IN ERROR.

Counsel for plaintiff in error relies upon two points only, for reversal of the judgment.

First: Discrimination between persons, and second: Interference with the right of contract.

In presenting the first proposition to this Court,

counsel set up at the outset an entirely new and different theory from that relied upon in the State Court, and now present a question that was never suggested to the State Court, and was not passed upon by it.

Improper and discriminatory classification was indeed one of the assignments to the State Supreme Court, but the portion of the statute now pointed out, and the reasons first urged here by plaintiff in error to sustain its contention were never presented to any of the lower courts. It first made its appearance in the printed brief of plaintiff in error to this Court. We refer to the alleged discrimination in favor of the "Regular Established Dealer."

Counsel here dwell at length upon this clause of the act and apparently find in it the chief discriminatory feature. But in the court below no suggestion of this feature was made; the clause was not brought to the attention of the court at any stage of the proceedings, and the point now urged has never had consideration by any of the lower Courts. At page 18 of the transcript of record, the points made by appellant are set forth. Of these, the fourth and fifth points only refer to alleged discrimination. At page 26 of the transcript of record, the grounds and reasons of appellant, in support of point four, are set forth. The premise of the assignments is that the act is discriminatory, because certain classes are without the operation of the law.

(a) Persons who sell at one place only.

(b) Persons who sell at two or more places, but who, with the intent and purpose of destroying a competitor, at one of such places make the same low prices which are necessary so to do at both places.

(c) Persons who sell at two or more places and who, with the intent and purpose of destroying a competitor at each place make the necessary low prices at all places.

The contention was that the law is discriminatory in that the forbidden act did not apply to the above named classes; that it applied only to a dealer who made different prices for different places, with intent, etc.

This was the only argument and the only point presented to the State Supreme Court. This was the only point decided by the State Supreme Court as to discrimination between persons.

Referring now to the brief of plaintiff in error in this Court, it will be observed that the point passed upon by the State Court is made secondary, and as a main point, and for the first time, we note the reference to the "Regular Established Dealer."

In other words, the plaintiff in error attacked the act as discriminatory in the State Court, on the sole ground that it was against such dealers only, as sold at different prices at two or more points, while in this Court an entirely different theory is presented in the contention that the act is discriminatory on the grounds that it operates in favor of a regular established dealer as against one who is not a dealer.

Point 5 of the assignments to the State Court also alleges discrimination, but confines it to discrimination between corporations and individuals. This point has here been abandoned.

It thus clearly appears that, if this Court considers the argument of counsel for the plaintiff in error, as to discrimination in favor of: "The Regular Established Dealer," it will need to pass upon a point and consider issues never raised in the Court below.

If counsel had relied upon the feature here suggested, it should have been first presented to the State Court, either at the first argument, or if overlooked there, then by petition for rehearing before that Court.

Section 464 Rev. Code Civ. Proc. S. D. 1903.

Rule 24 S. D. Supreme Court.

And since this feature of the case was not presented to the State Court it ought not to be considered here.

Hamilton Mfg. Co. vs. Massachusetts 6, Wall 632.

Wilson vs. McNamee, 102 U. S. 572.

Dewey vs. Des Moines, 173 U. S. 193.

DOES THE ACT FAVOR ANY PARTICULAR CLASS?

Should this Court, notwithstanding the fact that the point was not raised in the lower Courts, consider the assignment that the act was partial and discriminatory legislation, and operating only in favor of and for the protection of a particular class of the

public, and not other classes similarly situated, then we take the position that the act in question is not intended to favor or protect any particular class of the public; that the act is aimed at unfair competition, by means of unfair discrimination by any person, firm or corporation between different sections, communities or cities of the State, with the intentional purpose of destroying the competition of any regular established dealer, or to prevent the competition of any person who, in good faith, intends and attempts to become such dealer, and the ultimate wrong described and prohibited by the act is that of destroying competition, not that of injuring a particular competitor. Of course, an injury to the public results in injury to individuals, and injury to an individual, to his person or property, may be of such a character that for the general protection of others similarly situated, the wrong is made criminal. In the one class of cases, the public is the direct object of the injury committed; in the other, the direct injury is to the individual; but there is a general resulting injury to the public, justifying the punishment of the prohibited act as a public offense, and the act under consideration clearly has reference primarily to the public injury; and the very thing sought to be prohibited by the act was the intentional destroying of the business of a competitor by unfair discrimination, and thus creating a monopoly.

It will be observed that no right of action, under the act, obtains to any regular established dealer, or

that such dealer can in any manner invoke the enforcement of the act, but it is the duty of the Attorney General of the State where complaint is made to investigate the same; to take testimony and require the production of books or other documents, and then if in his opinion the act has been violated, he prosecutes the act in the name of the State against the violators. If it could be said that the act favors any one class it surely includes therein all who could properly be included, and excludes none who could by any manner of reasoning be included therein; and the insertion of such class within the act was necessary to define the offense sought to be prohibited and was not intended as a privilege, exemption or favor, but rather as a restriction or limitation upon the acts going to constitute the offense.

The case of Chicago, Milwaukee & St. Paul Railway Co. vs. Westby, 178 Fed. 619, cited by the plaintiff in error upon this proposition, has no bearing upon the point under discussion, as the act under consideration in that case was one which gave to certain persons a right of action which was withheld from other persons similarly situated, and which that Court properly held was unconstitutional, as denying the: "Equal Protection of the Laws."

POLICE POWERS

The Act in question, having for its purpose the maintenance of a healthy competition in all commodities in general use in the State, and the prevention

of a monopoly acquired by the means sought to be prohibited by the act and defined in the act as unfair discrimination, seems clearly to be an act designed by the Legislature, to promote the general welfare and prosperity of the citizens of the state, and if so, is well within the police powers of the state.

It is the public policy, not only of South Dakota, but of all the states, and the Federal government, to restrain monopolies and encourage competition. Everywhere are found laws prohibiting pools and combinations in restraint of trade.

In the case at bar, we are dealing with one of the principal commodities in general use in the state, towit: lumber and builders' material, and the plaintiff in error was convicted of the offense of discriminating in its price for the purpose of destroying the business of its competitor, and the prevention of legitimate competition which would of necessity follow such destruction. These conditions and possibilities were before the Legislature and furnished the motive for the legislation, and as this Court has said in the case of *In Jacobson vs. Massachusetts*, 197 U. S. 11: "The legislature, being familiar with the local conditions, is primarily the judge of the necessity of such enactments. The mere fact that the Court may differ with the legislature in its views of public policy, or the judges may hold views inconsistent with the propriety of the legislation in question affords no ground for judicial interference, un-

less the act in question is unmistakably and palpably in excess of the legislative power. * * * * *

If the law in controversy has a reasonable relation to the public welfare * * * it is not to be set aside, because the judiciary may be of opinion that the act will fail of its purpose or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the Government."

This Court in discussing the police power of states, in the case of Gundling vs. Chicago, 177 U. S. 183, summarized the doctrine as follows:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state; and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed, without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

The legislature in passing this Act were dealing with conditions as they now exist, and were endeavoring to meet and overcome evils that had grown up in the commercial development of the state. The combinations of corporations and vast aggregations

of capital caused conditions which had not formerly existed. All well informed persons are now fully and keenly alive to the marvelous economic changes which the rapid industrial and commercial development of the nation in recent times has produced. New economic forces have been evolved, and the social relations of men have become complex and interdependent to a degree previously inconceivable.

Numerous subjects which formerly were chiefly private, with only an incidental public aspect, have become social subjects demanding regulation of a kind, and to an extent which former conditions did not warrant, and the business of the production, manufacture or distribution of any commodity, in general use, is now clearly discriminated as belonging to the latter class, and so long as the power of the legislature is exercised for the public good—for the prevention of monopoly and the promotion of a fair and healthy competition, the legislation is justifiable.

In the case of *House vs. Mayes*, 219 U. S. 270, Mr. Justice Harlan, in writing the opinion in that case, said in part:

"A state of the Union may exercise all such governmental authority as is consistent with its own constitution, and not in conflict with the Federal Constitution; that such a power in the state, generally referred to as its police power, is not granted by or derived from the Federal Constitution, but exists independently of it, by reason of its never having been surrendered by the state to the general government; that among

the powers of the state, not surrendered—which power therefore remains with the state—is the power to so regulate the relative rights and duties of all within the jurisdiction as to guard the public morals, the public safety, and the public health, as well as to promote the public convenience and the common good; and that it is with the state to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States. The cases which sanction these principles are numerous, are well known to the profession and need not be here cited."

That the Act in question is a police regulation and clearly within the powers of the state, we cite the following authorities:

McLean vs. Arkansas, 211 U. S. 546.

Bacon vs. Walker, 204 U. S. 317.

Bank vs. Haskell, 219 U. S. 104.

Canfield vs. United States, 167, U. S. 518.

Chicago B. & Q. R. Co. vs. McGuire, 219 U. S. 549.

Commonwealth vs. Alger, 7 Cush. 53.

CLASSIFICATION.

Under this head, counsel for plaintiff in error, again play upon the words "regular established dealer," disregarding the following portions of the Act which plainly includes **any** one who may become similarly situated. This particular point was not

passed upon by the State Supreme Court for the obvious reason heretofore given—it was not presented to that Court.

But is there any merit in the argument? The protection to the dealer is incidental only. The primary object is the welfare of the public. It is manifest that the public welfare demands dealers in commodities of general use, so that such commodities may readily be obtained. It is further manifest that the public welfare demands a fair and reasonable competition in such dealing, so that no monopoly may obtain.

The public is not particularly concerned over the rival activities of competing dealers, so long as a fair competition continues. But the public is vitally concerned when any means or agency is employed to **destroy** competition and thus establish a monopoly.

No fine spun theories of plaintiff in error, no artful argument as to conjectural cases can blind the eye to the fact that Plaintiff in Error, in this case, made its different schedule of prices "with the intent of **destroying** its competitor." And that the destruction of its competitor, had, as the ultimate object, the establishment of its monopoly in the state of South Dakota.

The statute does not attempt to interfere with the fair rival competition of dealers. They may engage, as formerly, in any fair and just competition. They may add to their trade by cleaner stocks, larg-

er stocks, better selected stocks, more courteous treatment of customers, selling on time, or selling for cash at lower prices, more attractive advertising cleaner stores—the means for **fair** competition are multitudinous. The statute permits and encourages all this. But when competition adopts none of these means, but seeks to crush by mere financial strength—under selling at the point of competition and over selling at non-competitive points to recoup, then the statute applies as a protection to the fair dealing merchant and to the public.

Note the language of the statute:

"Any person, firm or corporation * * * that intentionally, for the purpose of destroying * * competition * * * or to prevent competition, shall discriminate between different sections * * * shall be deemed guilty of unfair discrimination."

Before any crime is committed under this act there must be the following combination of circumstances:

1. It must involve a commodity of general use.
2. There must be the **intent** to destroy competition.
3. There must be an **unfair discrimination** of charges between different sections.

It has been well said by the South Dakota Supreme Court that there is **no** classification in this statute.

Its provisions apply to **any** person, firm, or corporation.

It covers **every** commodity of general use.

It applies to **all** sections of the State.

Quoting from the opinion of Justice Whiting:

"It (the argument of Appellant) is resting on an alleged arbitrary classification of persons based upon their conditions, and yet, in the words above quoted, it will be seen that what is more complained of is not, that the law does not reach **all persons**, but rather that the law does not reach all the **means which may be used** to bring about the wrong aimed at." (Page 27, Transcript.)

No distinction is made in favor of, or against, any class of persons. The statute clearly applies to all alike. But if this Court should decide that the South Dakota Court is in error as to there being **no** classification in this statute, we are confident that there is no such classification as to render the act repugnant to the Fourteenth Amendment.

Equal protection is not denied when the law operates alike upon all persons similarly situated.

McLean vs. Arkansas, 211 U. S. 539.

Long prior to the decision last above cited, this court had similarly construed the Fourteenth Amendment.

In 1884 the Court held that Sec. 1 of the Fourteenth Amendment meant only equality **as to all persons similarly situated**.

Barbier vs. Connolly, 113 U. S. 27.

Justice Field there uses the following language:

"The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property; the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed, to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power to prescribe regulations to promote the health, peace, morals, education and good order

of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits; for supplying water, preventing fires, lighting districts, cleaning streets, opening parks and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application; if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

And this doctrine has not been departed from.

Walston vs. Nevin, 128 U. S. 578.

Minneapolis vs. Beckwith, 129 U. S. 26.

Tinsley vs. Anderson, 171 U. S. 106.

Fid. Mut. Life Asso. vs. Mettler, 185 U. S. 325.

Gundling vs. Chicago, 177 U. S. 183.
 Moeschum vs. Tenement H. Dept., 70, L. R. A. 704. (Affirmed in 203 U. S. 583.)
 Bachtel vs. Wilson, 204 U. S. 41.
 Heath and Milligan vs. Worst, 207 U. S. 354.

In Atchison, Topeka, etc., Ry. Co. vs. Matthews (174 U. S. 106), decided in 1898, the court quotes with full approval the language used by Justice White in Barbier vs. Connolly, *supra*.

The undoubted **right** to classify being thus conceded, it only remains to inquire whether the act now under consideration is reasonable in its classification, and operates alike on all similarly situated.

Classification does **not** mean equality.

In Atchison, Topeka Ry. vs. Matthews, *supra*, the court says:

"It is the essence of classification that upon the class are cast duties and burdens different from those resting upon the general public."

We notice that counsel for appellant rely strongly upon the case of Gulf, etc., Ry. Co. vs. Ellis, 165 U. S. 150. This case is cited again and again by them as if it were the final declaration of the Supreme Court of the United States upon this proposition. But we call attention to the fact that the latter case of Achi-
 son, etc., Ry. Co. vs. Matthews, in effect, and upon principle, overrules the Ellis case. The Ellis case was cited and commented upon in the later Matthews case, and it clearly appears that the Texas statute

(considered in the Ellis case) was not held unconstitutional because it classified railroads, as against other business pursuits, but because its object was to compel the payment of a certain favored class of indebtedness.

Applying the principle as announced and held to in the Matthews case, we find a classification upheld and sustained where the object of the legislation was to prevent injury by a class which was peculiarly liable to cause injury. Applying this reasoning to the case at bar, there is no danger to the general public in the conduct of a business at a single business point by a single individual. Such a person, or one of such a class, does not have the power or ability, or the opportunity of working an oppression in the conduct of his business. But the same individual, when he enters another class—a class where many stores are maintained by an individual or a corporation at many different points—an individual or a corporation of this class is clothed with power and has the opportunity to oppress. As against such a class there is need of police regulation, and the classification could not be more reasonable than that adopted by the act of 1907. We find ordinances in cities, regulating the speed of automobiles. Such ordinances are valid and necessary. They are directed against automobiles alone, because the automobile driver has the **opportunity** and the **means** to cause havoc and disaster if he is unrestrained and if the speed of his machine is unregulated. But we find no ordinances

regulating the speed of wheelbarrows, nor against the man who operates a wheelbarrow, because in the running of that vehicle there is no opportunity or means of inflicting injury, upon the public. If a man drives an automobile, he is restricted by ordinance or by statute. If the same man does **not** run an automobile he is **not** restrained by ordinance or by statute. He is in a class by virtue of what he does at the time. So it is with the man who operates one store at a single point. He does not come within the class designated by Chap. 131 of the Laws of 1907, but if the same man, either by himself, or in alliance with others, extends his operations and engages in the same line of business at many different points, then by virtue of this change in his method **he comes within the class and is subject to the regulations provided for that class.**

Applying the rule of the fourteenth amendment to the question of taxation, the Supreme Court of the United States has said that the rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances

Magoun vs. Ill. Trust, etc., Bank, 170 U. S. 293.

Applying this principle to the case at bar, we find that the man who operates a single business at a single point is treated just the same as any other man operating a single business at another point. And a man operating two or more stores at two or more points is treated just exactly, and has the same re-

strictions imposed upon him, as any other man operating two or more stores, at two or more different points. Thus each class, under the same circumstances, is treated with exact equality and the laws operate with exact uniformity.

The case of Magoun vs. Bank was referred to in the later case of Orient Insurance Co. vs. Daggs (172 U. S. 561), and the court there applies the same principle in passing upon a statute relating to insurance companies. The state of Missouri made certain discriminations against fire insurance companies and classified fire insurance as against all other classes of insurance. The Supreme Court of the United States, in this case, used the following language.

"It is not necessary to state the reasoning upon which classification by legislation is based or justified. This court has had many occasions to do so, and only lately reviewed the subject in Magoun vs. Illinois Trust & Saving Bank, 170 U. S. 293. We said in that case that 'the state may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion.' And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical and is not reviewable unless palpably arbitrary."

With these principles in mind, how may it be said that the act of 1907 is "palpably arbitrary?" It

is true that a certain method of conducting a business is hedged about by restrictions, but these restrictions apply to every citizen who engages in that certain method of doing business. There is no exception of agricultural products, as in the Illinois case. (Connelly vs. Union Sewer Pipe Co., 184 U. S. 540.) There is no limitation as to a particular kind of business, as in Gulf, etc., Ry. Co. vs. Ellis (165 U. S. 150.) It operates alike upon every citizen, coming within the class, and applies to **every commodity in general use**. It does not restrict any merchant or person until that person or merchant conducts his business in such a way as to become a menace to others.

We further call attention to the wording of our statute. "**Any person who discriminates** by selling **any commodity** at a lower rate in one section than he does in another is guilty of unfair discrimination." What is the class? **Any one who commits this act.** The statute does not classify as to age, ability, race or color. It does not classify as to residence or non-residence. It does not classify as to wealth. It is no more an arbitrary classification than the familiar statute, "Any one who engages in the business of selling intoxicating liquors shall pay license," etc., etc. It is no more arbitrary than the statute, "Any person who shall attempt to conceal any estray," etc. Nor the one, "Any person who shall willfully cut down a telegraph wire," etc.

It applies to **any and all** who do the thing or

come within the class. Any one and every one whomsoever may have this "privilege or immunity," or avoid it, by entering or staying out of that particular class.

A late case decided by the United States Supreme Court well illustrates the necessity and the validity of classification according to conditions. We refer to the case of Bacon vs. Walker, cited in 204 U. S. at page 318. An Idaho statute provided that no person should be permitted to graze his sheep on the public domain within two miles of a dwelling house. This statute was attacked on the ground that it was an arbitrary and unreasonable discrimination against the sheep industry, but the Court says:

"Counsel extend to this contention the conception of the police power which we have just declared to be erroneous, and, enumerating the classes discriminated in favor of as cattle, horses, hogs, and even poultry, puts to question whether, in herding or grazing sheep, 'there is more danger to the public health, comfort, security, order or morality, than the classes of animals and fowls above enumerated.' 'What,' counsel asks, 'are the dangers to the public growing out of this industry that do not apply with equal force to the others? Does the herding or grazing of sheep necessarily and because of its unwarrantable character, work an injury to the public? And, if dangerous in any degree whatever, are the other classes which are omitted and in effect excepted entirely, free from such danger, or do such

exceptions tend to reduce the general danger?" Contemplating the law in the aspect expressed in these questions, counsel are unable to see in it anything but unreasonable and arbitrary discrimination. **This view of the power of the state, however, is too narrow. That power is not confined, as we have said, to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people. This is the principle of the cases which we have cited."**

The Supreme Court sustained the Idaho statute as against the constitutional objection. In connection with this case we wish to emphasize the trend of modern decisions in extending the police power to matters concerning the "general welfare." And what is for the "general welfare" is a matter peculiarly within the knowledge of the legislature of each state. The Idaho statute might be wholly inapplicable to the state of New York. The South Dakota statute might not be for the general welfare in a state like Idaho. But the legislature of this state saw the danger of permitting the small and independent dealers to be driven out by the rapacity and greed of the large concerns, and in its wisdom it passed the act in question. Whatever difference of opinion may exist as to the efficacy of this law to prevent monopoly, the effort to prevent monopoly will be conceded as an effort for the "general welfare" of the people of this state.

The Supreme Court of the United States in *Gundling vs. Chicago* (177 U. S. 183), uses the following language:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference."

In *Bachtel vs. Wilson* 204 U. S. 41, the United States Supreme Court uses this language:

"The fourteenth amendment was not designed to prevent all exercise of judgment by a state legislature of what the interests of the state require, and to compel it to run all its laws in the channels of general legislation. It may deem that social and business conditions, without penal legislation, afford ample protection to the public against wrongdoing by certain officials, while such legislation may be deemed necessary for like protection against wrongdoing

by other officials charged with substantially similar duties * * * In short, the selection, in order to become obnoxious to the fourteenth amendment, must be arbitrary and unreasonable; not merely possibly, but clearly and actually so."

Citing *Carrol vs. Greenwich Ins. Co.*, 199 U. S. 401.

The late case of *Heath & Milligan vs. Worst*, 207 U. S. 354, sustains a classification adopted by the legislature of North Dakota and reviews extensively the former decisions of the court wherein the right of the legislature to classify in the exercise of its police power has been sustained. This late expression of the Supreme Court clearly marks the modern tendency to give credit to the legislature for classifying as may be necessary "for the general welfare."

When the "bulk sales acts" first began to be enacted by the various states, they were attacked vindictively on the ground that they were "special" or "class legislation." But these acts have been sustained as a reasonable exercise of the police power to prevent fraud.

Kidd, Dater & Price vs. Musselman Groc. Co.
217 U. S. 461.

In *St. George vs. Hardy (N. C.)*, 60 S. E. 921, a statute was attacked on the ground that it was unconstitutional as in violation of the fourteenth amendment. This statute provided that vessels, of **over 60 tons** gross, are required to take a state licensed pilot from Sea to Southport and from Southport

to Sea. There was an apparent discrimination in this act as between vessels of **under** 60 tons burden and vessels of **over** 60 tons burden, and the further apparent discrimination between vessels that sail from Sea to Southport and from Southport to Sea, and vessels that sail to and from **other** ports of the state. But the act was held valid and constitutional and the court cited as authority the early case of Cooley vs. Wardens, 12 How. 299, wherein a similar classification was considered. In that case the requirement of a state licensed pilot was deemed necessary as to vessels of a certain size and as to vessels sailing from a certain port, and the court held that such a classification might be reasonable, considering the conditions that prevail. In the case at bar there may be a restriction where several places of business are conducted under the one management at several points, and no restrictions where a single business is conducted under a single management at a single point. If the statute be so construed, the necessity of the restriction in the one case, and the absence of the necessity of restriction in the other, is apparent; and the classification certainly is not as arbitrary as in the North Carolina statute above mentioned.

The following additional authorities are instructive as to this phase of the present inquiry:

Holden vs. Hardy, 169 U. S. 397.

Nat. Cotton Oil Co. vs. Texas, 197 U. S. 130.

Cook vs. Marshall Co., 196 U. S. 261.

Field vs. Barber, 194 U. S. 618.

Counsel argue that the statute in question exposes to danger the dealer engaged in business at many points. Such dealer may be attacked by a single point dealer at the one locality, and prices lowered to a point below profit, so that the many point dealer might be driven out of business. This is a serious danger. It is about as serious as the proposition that the gnat may swallow the elephant. It is as serious as the proposition that the speed of wheelbarrows should be regulated as well as the speed of automobiles.

The Standard Oil Company might be driven out of business if the dealer in axle grease at Leola cut prices in that commodity, but it is hardly probable.

And yet, it will be noted, that if **any** lone person attempted to destroy the competition of the Standard Oil Company, by selling below cost at one point, while maintaining regular prices at another, Standard Oil would be protected by this statute just as fully and completely as is the smallest dealer.

The broad and generous provisions of the statute make it apply to all who may violate it. As has been said by the South Dakota Supreme Court, "The only classification claimed by appellant is a classification as to persons, yet this law applies to every existing person, partnership, or corporation, without regard to wealth, age, situation, color or any other method of distinction." (Page 26, Transcript.)

Again counsel urge, with much zeal, that a many point dealer may put down prices at all points

and be guilty of no offense, while if he puts down prices at one point only, he commits an offense. Even so; wherein does that make the statute violative of any constitutional provision? Suppose the Central Lumber Company, or the Standard Oil Company elected to avoid the statute by such method, it would at least be placed on the same footing with the lone dealer. It would be deprived of its former unconscionable advantage. It might effect its object and ruin the competition, but it would be apt to ruin itself in so doing. It is not probable that such a step will ever be taken, even though counsel has pointed out the way. It occurs to counsel for defendant in error that the objections to the statute are in the main, that it quite effectively closes the door to unfair and unconscionable competition. If it were less effective, it would not be so obnoxious.

Again counsel urge that a many point dealer may be attacked by several one point dealers and prices lowered at several points with intent to destroy the competition of the large dealer. A sufficient answer to this contention is that if such general attack were made, it must be by agreement between the several one point dealers, and the attacked party will find its remedy in the earlier legislative acts against combinations and agreements in restraint of trade.

Counsel for Plaintiff in error close their argument on this branch of the case by again asserting that the act is discriminatory; first, because it is in

favor of the regular established dealer and, second, because it imposes obligations **against** the dealer having two or more places of business.

Defendant in error has sought to point out that the first contention should not be considered because it has never been presented in any manner to the lower court, nor passed upon by it. But that, if it be considered here, a fair reading of the entire act will impress the conviction that it applies not only to the regular established dealer but to any one who may intend to become such dealer—and thus applies to all.

And as to the second point, we confidently maintain that there is nothing in the statute to warrant such premise. A dealer with only **one** established place of business comes within the inhibition of the statute, if he peddles his goods at **different points** and sells at **different prices** with the intent of destroying the business of a competitor. And a dealer with **two or more** established places of business has no restriction cast upon him, under the statute, unless he commits the same act that the other would be punished for.

The only possible difference in the status of the parties is that the two point dealer may more **conveniently** violate the statute. But surely the difference in convenience will not render the act partial so as to subject it to the constitutional objection.

IS THE ACT DISCRIMINATING LEGISLATION?

Keeping in view the proposition that the purpose of the Act is the prevention of a monopoly acquired by unfair discrimination encompassed by the selling at a lower rate in one section than is charged by the same person in another section, after equalizing the distance from the point of production, manufacture or distribution, and freight rates therefrom, with the intention and for the purpose of destroying the competition of any regular established dealer or to prevent the competition of any person who, in good faith, intends and attempts to become such dealer, it will readily be seen that the Act is not discriminatory, but applies equally to all persons alike who violate the Act in the manner and for the purpose prohibited.

The plaintiff in error here, under this Act, stands on precisely the same footing as every other person, firm or corporation, either foreign or domestic, who by their acts bring themselves within the purview of the Act in question, and it cannot be said that there has been an arbitrary or unreasonable selection, and in the nature of the case the unfair discrimination which is condemned in the Act is practicable as a practice only to those who engage in the business on a large scale.

To have attempted to have brought the persons or corporations who sell at one place only, within the purview of Act, would have defeated the very purpose of the Legislative enactment, as the non-

restriction of competition. The creation of a monopoly, and the protection of the general public is the evil aimed at, and it may be presumed that, should it become necessary to bring other classes within the statute, appropriate legislation will follow as soon as the necessity for it shall appear.

The line of demarcation, if it may be said that one exists in the Act, is unquestionably based upon a natural reason, and one in harmony with the necessities of the conditions sought to be remedied.

State vs. Creamery Co. 133 N. W. 895.

State vs. Standard Oil Co. 126 N. W. 527,

DOES THE ACT IN QUESTION UNREASONABLY INTERFERE WITH THE RIGHT OF CONTRACT?

The Act in question, in no manner, attempts to abridge or impair the rights of the plaintiff in error to enter into any lawful contract, and it is not the making of the contract which is forbidden, but the conduct, purpose and motives of the party, in connection with its acts, which bring it within the prohibition of the law.

In Chicago, B. & Q. R. Co., vs. McGuire, 219 U. S. 549, Mr. Justice Hughes, writing the opinion in that case, said in part: "Freedom of contract is a qualified but not an absolute right. There is no absolute freedom to do as one wills, or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide depart-

ment of activity which consists of the making of contracts or deny to government power to provide restrictive safe guards.

Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community * * * it is subject also in the field of state action to the essential authority of government to maintain peace and security, and to enact laws for the promotion of health, safety, morals and welfare of those subject to its jurisdiction."

After citing several cases illustrating the power of states to regulate and pass laws restricting the freedom of contract, the Court further says: "The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of **power** is not to be confused with the scope of legislative considerations in dealing with the matter of **policy**. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should

be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

Testing this Legislation by the foregoing rules, can it be said that the prohibiting and making criminal unfair discrimination by the wanton and intentional destruction of the business of a competitor, by selling at one point lower than at another, is not justifiable legislation, well within the police powers of the state, and not an abridgement of the rights of the plaintiff in error or any other person similarly situated to make any lawful contract.

The illustrations drawn by counsel in error, in the discussion of the Act in relation to the freedom of contract clause of the 14th Amendment of the Federal Constitution are fallacious in the extreme, as it is not pretended that the Act covers all of the methods whereby monopoly could be acquired, and the inclusion within the Act of all the classes, and methods suggested by counsel, would defeat its very purpose. The Act, of necessity does not and should not include all persons who could in any manner offend, and while it is possibly within the purview of the Legislature to prohibit unfair competition reached by means suggested by counsel, unfair discrimination, as condemned and prohibited by the Act, could not be accomplished by any other means and could not embrace and include anyone not now brought within the provisions of the Act, and it can

not be said that it does not affect all persons alike who are similarly situated, and this is all that is required in this class of legislation.

The whole question here appears to be this, is this Act within the police powers of the state, and is the prohibition sought to be enforced here a valid exercise of such power? If it is, the argument of appellant is answered.

Police power has been variously defined, commencing with Chancellor Kent, who describes it as "The maxim of law is that a private mischief is to be endured rather than a public inconvenience," and it has come down the years with such additions and enlargements as the changing conditions have required, and among the late definitions we cull the following as being fairly expressive: "The police power in its broadest acceptation means the general power of the government to preserve and promote the general welfare by prohibiting all things hurtful to the comfort, safety and welfare of society and establishing such rules and regulations for the conduct of all persons, and the use and management of all property as may be conducive to the public interest." This power is in the several states, and in this state its abridgement is necessarily denied by constitution. (Sec. 4, Art. 17.) As it was said by the court in *Hopper vs. Stack*, 56 Atl. Rep. 1, "It is of the very essence of the exercise of police powers that citizens may, for the public good, be constrained in their conduct with reference to matters in themselves lawful and right."

Under the power inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and when necessary for the public good, the manner in which each shall use his property.

Munn vs. Illinois, 94, U. S. 113.

McLean vs. Arkansas, 211 U. S. 539.

Williams vs. Arkansas, 217 U. S. 79.

Jacobson vs. Massachusetts, 197 U. S. 11.

Smith vs. Alabama, 124 U. S. 465.

The act in no manner interferes with the Plaintiff in Error's lawful and legitimate freedom of contract; it in nowise attempts to fix the price at which it shall sell its commodities; does not attempt in any manner to restrict lawful competition; does not prevent it from pursuing any lawful means in increasing its trade or extending its business; it does not prevent it from selling at what price it sees fit, without regard to what it may sell the same commodities elsewhere so long as its purpose is not in contravention of this law. All this law says to it is this: You cannot sell your lumber and builders' material at one point in the state at a less price than at another after equalizing freight rates, for the intentional purpose of destroying the business of a competitor dealing in the same place and in the same commodities. This is what this Plaintiff in Error was charged with doing in this case; and for so doing with the prohibited purpose it was convicted, so that the ap-

parent measure of freedom of contract contended for by this Plaintiff in Error is the freedom to destroy its competitors by the method which this statute intends to prohibit, and so after the last competitor has gone down before this unequal conflict, it could by using the same power to deter, as well as to kill competition, effect and thereafter maintain an exclusive monopoly in its business. Such being the case, the only "liberty" or "right" withheld from this plaintiff in error is the right to intentionally so use its property so as to injure another, clothed with the same inalienable rights, to the end that the public may eventually suffer.

The sale and distribution of lumber and builders' material in the state of South Dakota is internal commerce of the state, and as such is subject to the police power of the state, and may be regulated by law.

Moore vs. American Transportation Co., 24 How. 39.

Covington & Cincinnati Bridge Co. vs. Kentucky, 154 U. S. 210.

Commonwealth vs. Strauss, 191 Mass. 550.
Greer vs. Connecticut, 161 U. S. 519.

The internal commerce of a state—that is, the commerce which is confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government.

Sands vs. Manistee River Imp. Co. 123 U. S. 295.

"By adequate laws looking to the suppression of evil, the state, through the exercise of its police power, must necessarily restrain the unbridled license of the citizen in his conduct and use of property, and restraints imposed in this way have never been held to illegally impair his liberty, as it is attested from many of the provisions of the codes of this state and of others and the constructions that have been given them. The freedom of speech, the liberty of person, and life itself, must be surrendered, when the public interests and the order of good government so require. The liberty of the citizen, which embraces the legal right to his property, and to lawfully contract concerning it, stands upon no higher ground." This is taken from the decision of the Texas Court of Appeals in the case of Waters-Pierce Oil Co. vs. Texas, 19 Tex. Civ. Appl., and that case has been affirmed by this Court.

Waters-Pierce Oil Co. vs. Tex. 212 U. S. 84.

Many decisions might be cited to show the power of the state to properly regulate and restrict the freedom of contract, but it would seem that that power is so universally recognized at present that further citation would be unnecessary and a reflection upon this Court. But we desire to call the attention of the Court to some of the decisions of other jurisdictions on the "sales in bulk act," for the purpose of showing to what lengths a state may go in

the exercise of its police power in restricting the freedom of contract.

Lemieux vs. Young 211 U. S. 489.

Spurr vs. Travis, 108 N. W. 1090 (Mich.)

McDaniels vs. Shoe Co. 71 Pac. 37 (Wash.)

Neas vs. Borchers, 109 Tenn. 398.

Walp vs. Mooar, 76 Conn. 515.

Squire vs. Tellier, 185 Mass. 18.

In the case at bar, however, there is another reason why the conviction in this case must be sustained in so far as the freedom of contract is concerned. The Plaintiff in Error here is a corporation—a foreign corporation—doing business in this state under a permit granted it by the state, and a much different rule obtains as to it.

As was said by Mr. Justice Brown in the case of Hale vs. Henkel, 201 U. S. 43, immediately following his dissertation upon the rights of the individual to contract, set out in appellant's brief: "Upon the other hand, the corporation is the creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and limitations of its charter."

In McGuire vs. C. B. & Q. R. Co., 108 N. W. 902, the supreme court of Iowa says, through Judge Weaver, on page 911 of the opinion:

"The right of the state to regulate liberty of contract is peculiarly applicable to corporations. That

corporations are entitled to the equal protection of the laws has already been shown; but this does not mean that corporations and natural persons stand in the same relation to the power which inheres to the state to regulate their conduct or methods of business. The distinction between them is fundamental and ineradicable. The natural person has certain inalienable rights for which he is not indebted to organized society. He is born to them. The constitution and the laws recognize them and provide safeguards for them, but do not create them. The corporate person has no rights except those with which it is endowed by the lawmaking power, and the power of creation necessarily implies the power of regulation."

And in *Hammond Packing Co. vs. Arkansas*, 29 Sup. Ct. Rep. on page 378 of the opinion, Mr. Justice White says: "The contention that to apply the law to domestic corporations would, as to such corporations, cause it to be repugnant to the contract clause of the constitution, is without merit. The chartered right to do a particular business did not operate to deprive the state of its lawful police authority, and therefore the franchise to do business was inherently qualified by the duty to execute the charter powers conformably to such reasonable police regulations as might thereafter be adopted in the interest of the public welfare. Besides, it is not disputed that the state, under its constitution, had a reserve power to repeal, alter and amend charters by its

granted, and therefore, even if the impossible assumption be indulged that the grant of the power to do business implied, in the absence of such reservation, the right to carry on business in violation of a lawfully regulating statute, the existence of the reserve power leaves no semblance of ground for the proposition."

The plaintiff in error here being a foreign corporation, its right of contract is not the same as a natural person, and it is not protected by the fourteenth amendment to the federal constitution.

Waters-Pierce Oil Co. vs. Texas, 177 U. S. 28, p. 43.

Paul vs. Virginia, 8 Wall. 168.

It is not liberty of contract the plaintiff in error seeks, but rather "license to use its property to the hurt of another," as the court says in the case of State vs. Drayton, *supra*, from which we quote liberally, as it is absolutely in point: "It does not seek to prevent any person or corporation from engaging in any lawful business, nor does it prevent legitimate competition, nor seek to interfere in any way with the due management of anyone's business nor prevent the sale of any commodity at any price which the owner may fix or demand. Indeed, the act recognizes the right of all to engage in the production, manufacture, distribution and sale of any and all commodities in general use. There is a clear recognition in law, in commerce, and in the

possession and use of property that every person has the right to use his own as he sees fit, so long as he does not interfere with the rights of others * *

* * The act in question only provides against the use and sale of one's property for the purpose of destroying the business of a competitor. The owner or dealer may sell for any price he may choose, on any terms he may adopt, without reference to what effect his action may have upon the trade or business of others, so long as he does not do so, for the purpose named * * * By underselling * * * he may compel them to adopt his scale of prices or abandon their business, yet, if his conduct is not for the purpose and with the intention prohibited by the statute, he is violating no law. The act clearly makes the purpose with which the act is done the controlling element of the offense."

Counsel for appellant severely criticise the opinion in that case because that Court in the course of the opinion makes this statement: "If the state has not the power to protect its people from the acts of those who have for their 'purpose' the destruction of the business of a competitor in order that the wrong-doer may have a monopoly, its powers are much more limited than we had supposed."

In the light of the present knowledge of the methods resorted to by the trusts of this country to create and maintain a monopoly upon practically all of the necessities of life, can it be doubted as to what was in the legislative mind when this statute was en-

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acted, and what evil it sought to prohibit? It is a matter of common knowledge that the Standard Oil Company created its present monopoly by the very method this statute seeks to prohibit, and it is no less well known that lumber companies have used the same methods to destroy local competition, and there can be no reasonable doubt but that the legislature enacted this law for the purpose of supplementing the anti-trust and anti-monopoly laws already upon our statute books, so as to reach a method of creating a monopoly not within the purview of the former laws.

State vs. Creamery Co. 133 N. W. 895.

State vs. Standard Oil Co. 126 N. W. 527.

State vs. Central Lumber Co. 123 N. W. 504.

MONOPOLY.

Under this heading, counsel for plaintiff in error, labor diligently to distinguish the statute in question from the former anti-monopoly acts, and seek to demonstrate that there is no relation between the two.

We have already considered this subject under our former title "The Purpose of the Act."

But we now wish to call attention to further matters, in this connection, evidently overlooked by counsel for plaintiff in error.

It is conceded that both the South Dakota Supreme Court and the Nebraska Supreme Court have

construed this anti-discrimination legislation as an amplification of the respective earlier anti-monopoly acts. Both of these state courts of last resort have thus placed their construction upon the acts, and both reached the same conclusion.

The argument of counsel, under the last above title, goes no further than to severely criticise the reasoning of the two courts in their construction of the State statute as applied to the provisions of the State Constitution.

The two state courts, have held that the anti-discrimination acts are to be construed **in reference** to the prior anti-monopoly acts, and as a part and portion of the entire state legislation in the attempt to prevent monopoly.

This Court has uniformly held that it would not interfere with the decision of a state court as to the construction of its own statutes, unless such construction itself raises a federal question.

The conclusion of the South Dakota Court, that the Act of 1907 must be construed in connection with the prior anti-monopoly Acts, and in connection with the provision of the State Constitution against monopoly, does not raise a federal question. The **reasons** given by that court in this construction of the statute do not bring the case within the purview of the Fourteenth Amendment.

The complaint of the plaintiff in error is that the statute is, on its face, unconstitutional, and is in

violation of the provisions of the Fourteenth Amendment. But they cannot now raise the question that this statute has no relation to the State anti-monopoly acts, and that it has no relation to Section 20, of Article 17, of the State Constitution.

The construction of the statute and the reasoning of the court might properly have been raised by plaintiff in error on petition for re-hearing in the state court. But the Supreme Court of the United States will not inquire into the reasons of a lower court, nor set aside its conclusions as to the relation of state statutes to each other, nor their relation to the state constitution.

Marchant vs. Penn. Ry. Co., 153 U. S. 380.
Morley vs. Lake Shore, Etc. Ry. Co., 146 U. S. 162.
McNulty vs. People, 149 U. S. 645.

Nevertheless, the reasoning of the South Dakota Supreme Court is sound, and it appeals forcibly to the unprejudiced mind.

Monopoly has ever been regarded as a menace to well ordered society. But the thought of monopoly is always seductive and alluring to tradesmen. Methods are continually sought whereby statutes against monopoly may be evaded.

The method pursued by the plaintiff in error in this case was highly successful in the State of South Dakota, until the legislature found a remedy in the Act of 1907. Perhaps this Act of 1907 may not close

all of the doors to monopoly, but it is effective until the ingenuity of tradesmen, aided by shrewd counsellors, finds another method of evasion.

We quote from the brief of the Attorney General of Nebraska, as presented by him to the State Supreme Court in the Drayton case:

"In passing the statute the legislature was concerned with protecting the public from the oppressions and extortions of monopolies rather than interfering with controversies between merchants. The law in fact does not attempt to prevent competition in trade, but forbids unfair and sinister competition 'for the purpose of destroying the business of a competitor.' Unfair discrimination to destroy a competitor's business is what is forbidden and no purpose to interfere with competition for any other purpose is attempted. An enactment for such purposes is lawful and this plain intention of the legislature should be accepted as the true one, to prevent a construction which would make the act in conflict with the Constitution.

Courts do not impute improper or unworthy motives to legislatures to justify the annulment of their acts, but assume they acted under lawful authority, if any can be found to sustain them. In other words, it is the duty of the courts in interpreting a statute to adopt if possible a construction that will make the legislation consistent with the Constitution. The legislators did not intend to violate the Constitution. They intended to pass a valid act. The pur-

pose to meddle in the rivalry between local merchants and disturb them in their property and contract rights, in violation of the Constitution, would be an unworthy and unnecessary motive to impute to the legislature. It is not justified by their language. An intention to exercise the police power to protect the people from the menace of monopolies is worthy of the law-making branch of the government. A statute to prevent unfair competition indicates such a purpose. It is a lawful one in harmony with the Constitution and for that reason, according to a universal rule, should be adopted by the Court. (State vs. Hill, 38 Neb. 703; Palius vs. Shawano, 61 Wis. 211; Marshall vs. Grimes, 41 Mass. 31; Newland vs. Marsh, 19 Ill. 384; Winter vs. Jones, 10 Ga. 200; State vs. Ins. Co. 115 Ind. 264; Sykes vs. Mayor, 55 Miss. 143; Santo vs. State, 2 Ia. 208; Singer Mfg. Co. vs. McCollock, 24 Fed. 669; United States vs. Central R.R. Co. 118 U. S. 240)."

The plain import of the statute to prevent unfair competition is to supply a defect in the anti-trust laws. Before the passage of this act those laws were directed against combinations by **two or more persons** in restraint of trade, but do not reach directly the most dangerous and harmful of all trusts, **a single corporation or individual** having the means and disposition to sell products below cost in a community until all competitors are ruined and driven out of business, and afterward oppress the public with the monopoly thus created. The act to

prevent unfair competition was intended to supply this defect in the anti-trust laws. The evil against which the legislation is directed is a common one and familiar to all.

Counsel, earlier in their brief, assert that Nebraska and South Dakota stand alone, among the sisterhood of states, as to legislation of this character, and in sustaining the validity of such legislation. But they have overlooked the fact that North Dakota, Kansas, Michigan, Tennessee, Oklahoma, Minnesota, and Iowa, have likewise found it necessary for the protection of their citizens to pass similar acts. (Chapter 258, Laws of 1907, North Dakota; Chapter 2, of the laws of 1905, Kansas; Chapter 329 of the Laws of 1905, Michigan; Chapter 36, of the Laws of 1907, Tennessee; Page 750, Laws of 1907-1908, Oklahoma; Chapter 260, Laws of 1907, Minnesota; Chapter 222, Acts 33rd Gen. Assem., Iowa.)

And in four of those states only have the acts been assailed as unconstitutional, and in each instance the Supreme Court of the State has sustained the act as a valid exercise of the police power of the State. (State vs. Drayton, 82 Neb., 254; State vs. Central Lumber Company (Now under consideration); State vs. Fairmont Creamery Co. Ia., 133 N. W., 895; State vs. Standard Oil Company, Minn., 126 N.W., 527).

And in each of these cases, it will be observed that the courts agree upon the question that the enactment of these statutes is an amplification of the

prior anti-monopoly acts of the State, and that the purpose of the anti-discrimination statute is to prevent monopoly.

While this method of dealing with the evil is comparatively new, yet every court that has had occasion to pass upon the constitutionality of such legislation has sustained it. There are no decisions of a court of last resort to the contrary.

It is true that the decisions of these various state supreme courts are **persuasive only in this Court**; but the unanimity of opinion of these eminent jurists is at least significant. This class of legislation has received careful consideration in each of the four tribunals; and each court ultimately reached the same conclusion.

In the case of *Waters Pierce Oil Co. vs. Texas*—212 U. S., 106—this Court used the following language:

“That State Legislatures have the right to deal with the subject matter and to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and punish monopoly is not open to question.” Citing

Nat'l Cotton Oil Co. vs. Texas 197 U. S. 115.

Smiley vs. Kansas 146 U. S. 147.

“Having the power to pass laws of this character, of course the state may provide for proceedings to enforce the same. The State, keeping within con-

stitutional limits, may provide its own method of procedure and **determine the methods and means by which such laws may be made effectual.**"

By the act of 1907, the legislature of the State of South Dakota, sought to make effective the former laws of the state against combinations and monopolies, and passed such act as one of the **means and methods** whereby the anti-monopoly laws might be made effective. At least this is the conclusion of the Supreme Court of the State of South Dakota and a similar conclusion was reached in respect to similar legislation by the Supreme Courts of Nebraska, Minnesota and Iowa. And opposed to the reasoning and conclusions of those courts, we find only the conclusions and reasoning of counsel for plaintiff in error herein, unsupported by any authority.

The decisions relied upon by plaintiff in error to support its contention in this respect are the "trading stamp cases," but there is a wide difference in principle between giving trading stamps as an inducement to draw **profitable** trade, and the selling of goods far below cost, with the studied intent to **destroy a competitor**: Yet, the selling of goods below cost is not an offense under the statute. It is the selling below cost at one point while maintaining higher or fairer prices at other points, coupled with the **purpose and intent to destroy the competition** that calls into effect the provisions of the statute. If the dealer has his business so well in hand that he can

profitably sell his goods at lower prices than can his competitor, there is nothing repugnant in his so doing, and there is nothing in the Act of 1907 to prevent him from so doing, but if he can sell **profitably** at lower prices at one point, it is reasonable to suppose that he can profitably sell the same goods at the same lower prices at other points where he may be dealing; and if such dealer has a different schedule of prices at different points for the same goods, we may then reasonably look for the cause. If the cause be legitimate, the statute still does not apply. The different schedule of prices must be coupled with: "The intent to destroy a competitor," before there is any violation of the statute.

This is far removed in principle from the seeking of trade by the inducement of trading stamps. There is no analogy whatever between the trading stamp cases, and the case now under consideration.

Can it be said that the Federal Constitution forbids the different states from protecting their citizens against such oppression as was here practiced by plaintiff in error?

Can it be said that the establishment of a monopoly by two corporations is wrong, but that the establishment of a monopoly by one corporation is legitimate? If this be true, then it requires only the dissolution of the two corporations, and the formation of one new corporation by the same stockholders to accomplish what the law is intended to prevent.

If the State is powerless to prevent the establishment of a monopoly through the agency of one corporation, no matter how powerful that corporation may be, then our entire system of anti-trust and anti-compact laws, both State and Federal is farcical.

IN CONCLUSION.

It must be conceded that the plaintiff in error sold lumber and building materials at Leola at less than a fair market value, while maintaining prices of at least a fair market value at its other places of business in South Dakota; that this reduction of prices below market value was for the express purpose, and with the intent of destroying the competition there. And it must be conceded that the only object for the destruction of this competition was to enable plaintiff in error to obtain a monopoly in the sale and distribution of lumber and building materials at Leola. The verdict of the jury and the judgment of the court is conclusive as to the above points. Since this was the first prosecution brought by the State for violation of the 1907 Act, the lower court very properly, upon conviction, imposed the minimum fine of two hundred dollars. The amount involved in money in this particular case is of small concern, either to plaintiff in error or to defendant in error, but the principle herein involved is of vital interest to every citizen of the State of South Dakota and to every citizen of the United States.

The method pursued by the Central Lumber Company in South Dakota to destroy competition and establish a monopoly in the sale and distribution of building material within the state is the same method that was so long and so successfully practiced by the Standard Oil Company and other large corporations. The legislature of the State of South Dakota, as well as the legislature of the States of North Dakota, Minnesota, Iowa, Nebraska, Kansas, Oklahoma and Tennessee, recognizing the evils that have been brought about by this unfair and sinister discrimination, have sought to check the evil by appropriate legislation.

This legislation has been found effective and will protect the public if it can be sustained. It has been sustained by every court of last resort that has thus far passed upon the question. The annulment of this legislation by this Court would practically nullify the anti-monopoly acts of the States, and be a serious curb to any legislation, having for its purpose the prevention of monopoly.

It has been found by tradesmen that monopoly may as well be accomplished through the "freezing out process," as by the former method of combinations and agreements, and if this Court should hold that the States are powerless to prevent monopoly thus acquired, then indeed a most serious condition is presented. The new method of evasion of the anti-compact laws has been met by new legislation

—the anti discrimination acts. A check has again been given to the establishment of monopolies.

The presumption that the legislature passed a lawful act for a lawful purpose should obtain, and unless it should clearly appear to this Court that the Act in question is palpably unreasonable and wholly arbitrary in its nature, then, under all of the prior decisions of this Court it must be upheld.

If, for any reason, the Court should be unable to see its way clear to sustain the Act in question, it is certainly of the utmost importance that a way be pointed out by the Court whereby this great injustice may be corrected. Surely, it cannot be held that the State is powerless to protect its citizens from the rapacity and greed of a corporation large enough to accomplish monopoly by sheer financial strength.

But we have been unable to observe any point suggested by counsel sufficient to invalidate the act in question. There is nothing in the authorities cited by them that can be considered as controlling in this case.

We are confident that the Act in question does not conflict with any of the provisions of the 14th Amendment to the Federal Constitution, upon any of the grounds, argued by counsel; that it is not partial or discriminatory legislation—does not violate "the equal protection clause" of the 14th Amendment, nor is there any discriminatory classification within the act; that it, in no manner, abridges the

freedom of contract guaranteed by the Constitution, but that it is a proper, valid, reasonable and necessary exercise of the police power of the State to protect its citizens from monopoly, and thus conserve the public welfare.

The judgment of the lower Court should be affirmed.

Respectfully submitted,

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